DOCKET

No. 13-1339

Title:	Spokeo, Inc., Petitioner v. Thomas Robins
Docketed:	May 7, 2014
Lower Ct:	United States Court of Appeals for the Ninth Circuit
Case Nos.:	(11-56843)
Decision Date:	February 4, 2014

Questions Presented

—Date—	——Proceedings and Orders——————————
May 1 2014	Petition for a writ of certioran filed. (Response due June 6, 2014)
May 7 2014	Order extending time to file response to petition to and including July 7, 2014.
Jun 2 2014	Brief amicus curiae of Pacific Legal Foundation filed.
Jun 4 2014	Brief amicus curiae of ACA International filed.
Jun 5 2014	Brief amicus curiae of Trans Union LLC filed.
Jun 6 2014	Brief amici curiae of Chamber of Commerce of the United States of America, et al. filed.
Jun 6 2014	Brief amici curiae of eBay Inc., Facebook, Inc., Google Inc., and Yahoo! Inc. filed.
Jun 6 2014	Brief amicus curiae of Experian Information Solutions, Inc. filed.
Jun 6 2014	Brief amicus curiae of Consumer Data Industry Association filed.
Jun 6 2014	Brief amici curiae of National Association of Professional Background Screeners, et al. filed.
Jun 6 2014	Brief amici curiae of New England Legal Foundation, et al. filed.
Jun 6 2014	Brief amicus curiae of DRI - The Voice of the Defense Bar filed.
Jun 9 2014	Order further extending time to file response to petition to and including August 6, 2014.
Aug 6 2014	Brief of respondent Thomas Robins in opposition filed.
Aug 19 2014	Reply of petitioner Spokeo, Inc. filed.
Aug 20 2014	DISTRIBUTED for Conference of September 29, 2014.
Oct 6 2014	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
Mar 13 2015	Brief amicus curiae of United States filed.
Apr 1 2015	DISTRIBUTED for Conference of April 17, 2015.
Apr 1 2015	Supplemental brief of petitioner Spokeo, Inc. filed. (Distributed)
Apr 20 2015	DISTRIBUTED for Conference of April 24, 2015.
Apr 27 2015	Petition GRANTED.
Jun 5 2015	The time to file the joint appendix and petitioner's brief on the merits is extended to and including July 2, 2015.
Jun 5 2015	The time to file respondent's brief on the merits is extended to and including August

	24, 2015.
Jul 2 2015	Brief of petitioner Spokeo, Inc. filed.
Jul 2 2015	Joint appendix filed. (Statement of costs filed.)
Jul 7 2015	Brief amicus curiae of Pacific Legal Foundation filed.
Jul 9 2015	Brief amicus curiae of Washington Legal Foundation filed.
Jul 9 2015	Brief amicus curiae of Trans Union LLC filed.
Jul 9 2015	Brief amicus curiae of Retail Litigation Center, Inc. filed.
Jul 9 2015	Brief amicus curiae of National Association of Home Builders filed.
Jul 9 2015	Brief amici curiae of Coalition for Sensible Public Records Access, et al. filed.
Jul 9 2015	Brief amici curiae of Chamber of Commerce of the United States of America, et al. filed.
Jul 9 2015	Brief amici curiae of eBay Inc., et al. filed.
Jul 9 2015	Brief amici curiae of American Bankers Association, et al. filed.
Jul 9 2015	Brief amici curiae of New England Legal Foundation, et al. filed.
Jul 9 2015	Brief amici curiae of National Association of Professional Background Screeners, et al. filed.
Jul 9 2015	Brief amicus curiae of ACA International filed.
Jul 9 2015	Brief amicus curiae of Experian Information Solutions, Inc. filed.
Jul 9 2015	Brief amicus curiae of Consumer Data Industry Association filed.
Jul 9 2015	Brief amici curiae of Alabama, et al. filed.
Jul 9 2015	Brief amici curiae of Time, Inc., and Seven Media Organizations filed.
Jul 9 2015	Brief amicus curiae of DRI - The Voice of the Defense Bar filed.
Aug 3 2015	The time to file respondent's brief on the merits is further extended to and including August 31, 2015.
Aug 31 2015	Brief of respondent Thomas Robins filed.
Sep 3 2015	Brief amicus curiae of Public Knowledge filed.
Sep 3 2015	Brief amici curiae of Natural Resources Defense Council, et al. filed.
Sep 3 2015	Brief amici curiae of Public Law Professors filed.
Sep 4 2015	Brief amicus curiae of Pension Rights Center filed.
Sep 4 2015	Brief amici curiae of Information Privacy Law Scholars filed.
Sep 8 2015	Brief amicus curiae of Constitutional Accountability Center filed.
Sep 8 2015	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Sep 8 2015	Brief amicus curiae of the United States filed.
Sep 8 2015	Brief amici curiae of Public Justice, P.C., et al. filed.
Sep 8 2015	Brief amici curiae of Electronic Privacy Information Center, et al. filed.
Sep 8 2015	Brief amicus curiae of Center for Digital Democracy filed.
Sep 8 2015	Brief amici curiae of Center for Democracy & Technology, et al. filed.
Sep 8 2015	Brief amici curiae of Restitution and Remedies Scholars filed.
Sep 8 2015	Brief amici curiae of Massachusetts, et al. filed.
Sep 8 2015	Brief amici curiae of Public Citizen, Inc., et al. filed.
Sep 8 2015	Brief amici curiae of Lawyers' Committee for Civil Rights Under Law, et al. filed.
Sep 8 2015	Brief amicus curiae of American Association for Justice filed.
Sep 9 2015	SET FOR ARGUMENT on Monday, November 2, 2015
Sep 10 2015	Record requested from the U.S.C.A. 9th Circuit.
Sep 11 2015	The record requested from the U.S.C.A. 9th Circuit is electronic and located on PACER.

Sep 21 2015	CIRCULATED
Sep 30 2015	Reply of petitioner Spokeo, Inc. filed. (Distributed)
Oct 5 2015	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Nov 2 2015	Argued. For petitioner: Andrew J. Pincus, Washington, D. C. For respondent: William S. Consovoy, Arlington, Va.; and Malcolm L. Stewart, Deputy Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.)

PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
FILED
MAY 1 - 2014
OFFICE OF THE CLERK

13-1339

No.

In the Supreme Court of the United States

SPOKEO, INC.,

Petitioner,

v.

THOMAS ROBINS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Congress may confer Article III standing upon a plaintiff who suffers no concrete harm, and who therefore could not otherwise invoke the jurisdiction of a federal court, by authorizing a private right of action based on a bare violation of a federal statute.

RULE 29.6 STATEMENT

Petitioner Spokeo, Inc., has no parent company. No publicly held company owns 10% or more of Spokeo.

TABLE OF CONTENTS

	Page
Question Presented	i
Rule 29.6 Statement	ii
Table of Authorities	v
Opinions Below	1
Jurisdiction	1
Constitutional and Statutory Provisions Involved	1
Statement	2
A. The Statutory Scheme.	3
B. Factual Background and District Court Proceedings.	3
C. The Court of Appeals' Decision.	5
Reasons for Granting the Petition	7
A. The Courts of Appeals Are Divided Over Whether An Injury-In-Law Satisfies Article III's Injury-In-Fact Requirement	9
B. Injury-In-Law Class Actions Under FCRA Seeking Huge Damages Are Being Filed With Increasing Frequency	12
C. A Decision In This Case Would Resolve Similar Issues Presented Under A Wide Range Of Federal Statutes	16
D. The Ninth Circuit's Decision Is Contrary To This Court's Standing Jurisprudence	19
E. This Case Cleanly Presents The Injury-In-Law Question	23
Conclusion	25

TABLE OF CONTENTS—continued

Page

Appendix A:	Opinion of the United States Court of Appeals for the Ninth Circuit, dated Feb. 4, 2014	1a
Appendix B:	Order of the United States District Court for the Central District of California, dated January 27, 2011	11a
Appendix C:	Order of the United States District Court for the Central District of California, dated May 11, 2011	15a
Appendix D:	Order of the United States District Court for the Central District of California, dated September 19, 2011	23a
Appendix E:	Fair Credit Reporting Act, § 15 U.S.C. § 1681 *et seq.*	25a

TABLE OF AUTHORITIES

Page(s)

CASES

Allen v. *Wright*, 468 U.S. 737 (1984) 21
Almendarez-Torres v. *United States*, 523 U.S. 224 (1998) 22
Alston v. *Countrywide Financial Corp.*, 585 F.3d 753 (3d Cir. 2009) 11, 17
American Express Co. v. *Italian Colors Restaurant*, 133 S. Ct. 2304 (2013) 14
Arizona Christian School Tuition Organization v. *Winn*, 131 S. Ct. 1436 (2011) 20, 22
Armes v. *Sogro, Inc.*, 932 F. Supp. 2d 931 (E.D. Wis. 2013) 9
AT&T Mobility LLC v. *Concepcion*, 131 S. Ct. 1740 (2011) 15
Avery v. *Werner Enterprises, Inc.*, No. 14-cv-330 (W.D. Mo. Apr. 9, 2014) 13
Bateman v. *American Multi-Cinema, Inc.*, 623 F.3d 708 (9th Cir. 2010) 15
Beaudry v. *TeleCheck Services, Inc.*, 579 F.3d 702 (6th Cir. 2009) 9, 11, 12
Blue Chip Stamps v. *Manor Drug Stores*, 421 U.S. 723 (1975) 15
Brittingham v. *Cerasimo, Inc.*, 621 F. Supp. 2d 646 (N.D. Ind. 2009) 9
Broberg v. *Experian Information Solutions, Inc.*, No. 14-cv-49 (D. Minn. Jan. 6, 2014) 13
Brown v. *Delhaize America, LLC*, No. 14-cv-195 (M.D.N.C Mar. 7, 2014) 13

TABLE OF AUTHORITIES—continued

Page(s)

Carsten v. *University of Miami*,
No. 14-cv-20497 (S.D. Fla. Feb. 10, 2014) 13
Carter v. *Welles-Bowen Realty, Inc.*,
553 F.3d 979 (6th Cir. 2009) 11, 17
Chapman v. *Wagener Equities, Inc.*,
___ F.3d ___, No. 14-8004,
2014 WL 1272786 (7th Cir. Mar. 31, 2014) 9, 16
Charvat v. *Mutual First Federal Credit Union*,
725 F.3d 819 (8th Cir. 2013), cert. denied,
134 S. Ct. 1515 (2014) 12
Clapper v. *Amnesty International USA*,
133 S. Ct. 1138 (2013) 24
C.M.D. v. *Facebook, Inc.*,
No. C 12-1216, 2014 WL 1266291
(N.D. Cal. Mar. 26, 2014) 19
Corliss v. *Providence Health & Services*,
No. 14-cv-119 (D. Or. Jan. 23, 2014) 13
David v. *Alphin*, 704 F.3d 327 (4th Cir. 2013) ... 10, 17
Deacon v. *Pandora Media, Inc.*,
901 F. Supp. 2d 1166 (N.D. Cal. 2012) 19
Dell'Olio v. *HCA HealthONE, LLC*,
No. 14-cv-885 (D. Colo. Mar. 26, 2014) 13
DeMando v. *Morris*,
206 F.3d 1300 (9th Cir. 2000) 16
Doe v. *Chao*, 540 U.S. 614 (2004) 23
Doe v. *National Board of Medical Examiners*,
199 F.3d 146 (3d Cir. 1999) 11, 18

TABLE OF AUTHORITIES—continued

Page(s)

Dowell v. *Wells Fargo Bank, NA*,
517 F.3d 1024 (8th Cir. 2008) 23
Edwards v. *First American Corp.*,
610 F.3d 514 (9th Cir. 2010), cert. granted,
131 S. Ct. 3022 (2011), cert. dismissed as improvidently granted,
132 S. Ct. 2536 (2012).....6, 10, 11, 18
Ellis v. *Swift Transp. Co. of Ariz., LLC*,
No. 13-cv-00473, Dkt. 36-1
(E.D. Va. Apr. 21, 2014)..... 14
Fair Housing Council v. *Main Line Times*,
141 F.3d 439 (3d Cir. 1998).....11, 18
First American Financial Corp. v. *Edwards*,
132 S. Ct. 2536 (2012)..... 2, 23, 24
Ford v. *CEC Entertainment, Inc.*,
No. 14-cv-677 (S.D. Cal. Mar. 24, 2014) 13
Friends of the Earth, Inc. v. *Laidlaw Envtl. Servs, Inc.*, 528 U.S. 167 (2000)..... 7
Gezahegne v. *Whole Foods Market California, Inc.*, No. 14-cv-592 (N.D. Cal. Feb. 7, 2014)..... 13
Gladstone, Realtors v. *Village of Bellwood*,
441 U.S. 91 (1979)..... 19, 20
Gonzalez v. *Harris Ranch*,
No. 14-cv-38 (E.D. Cal. Jan. 10, 2014) 13
Haber v. *Bank of America, N.A.*,
No. 14-cv-169 (E.D. Pa. Jan. 13, 2014)..... 13

TABLE OF AUTHORITIES—continued

Page(s)

Harris v. *comScore, Inc.*,
292 F.R.D. 579 (N.D. Ill. 2013) 19
Hathaway v. *Whole Foods Market California, Inc.*, No. 14-cv-663
(S.D. Cal. Mar. 21, 2014)..... 13
Henderson v. *First Advantage Background Services Corp.*, No. 14-cv-221
(E.D. Va. Mar. 28, 2014)..... 13
Henderson v. *HR Plus*,
No. 14-cv-82 (E.D. Va. Feb. 6, 2014)..... 13
Henderson v. *Wal-Mart Stores*,
No. 14-cv-208 (E.D. Va. Mar. 24, 2014) 13
In re Hulu Privacy Litig.,
No C 11-03764, 2013 WL 6773794
(N.D. Cal. Dec. 20, 2013) 18
Joint Stock Soc'y v. *UDV North America, Inc.*,
266 F.3d 164 (3d Cir. 2001).....11, 17
Kendall v. *Employees Retirement Plan of Avon Prods.*, 561 F.3d 112 (2d Cir. 2009)..... 10, 17
Knights v. *Publix Super Markets, Inc.*,
No. 14-cv-720 (M.D. Tenn. Mar. 12, 2014) 13
Linda R.S. v. *Richard D.*, 410 U.S. 614 (1973)..... 20
Lozano-Rivera v. *Universal City Nissan Inc.*,
No. 14-cv-1010 (C.D. Cal. Feb. 10, 2014) 13
Lujan v. *Defenders of Wildlife*,
504 U.S. 555 (1992)..... 7, 20, 21, 23

TABLE OF AUTHORITIES—continued

Page(s)

Lunds v. *Johns Pizza Cafe Ltd.*,
No. 14-cv-63 (D. Minn. Jan. 7, 2014) 13
Manno v. *Healthcare Revenue Recovery Group, LLC*, 289 F.R.D. 674 (S.D. Fla. 2013) 17
Manuel v. *Wells Fargo Bank*,
No. 14-cv-238 (E.D. Va. Apr. 1, 2014) 13
Murray v. *GMAC Mortgage Corp.*,
434 F.3d 948 (7th Cir. 2006) 9, 12, 14, 15
Myers v. *National Tenant Network, Inc.*,
No. 14-cv-327 (D. Or. Feb. 26, 2014) 13
Palm Beach Golf Ctr.—Boca, Inc. v. *Sarris*,
___ F. Supp. 2d ___, No. 12-80178-CIV,
2013 WL 5972173 (S.D. Fla. Oct. 22, 2013) 17
Patel v. *Trans Union, LLC*,
No. 14-cv-522 (N.D. Cal. Feb. 4, 2014) 13
Pekelney v. *Horizon Healthcare Services, Inc.*,
No. 14-cv-584 (D.N.J. Jan. 28, 2014) 13
Plasters v. *UBS Financial Services, Inc.*,
No. 14-cv-1659 (D.N.J Mar. 14, 2014) 13
Ragland v. *Guardsmark, LLC*,
No. 14-cv-693 (S.D. Cal. Mar. 26, 2014) 13
Raines v. *Byrd*, 521 U.S. 811 (1997) 8, 19
Reed v. *Golf & Tennis Pro Shop, Inc.*,
No. 14-cv-895 (D.N.J. Feb 12, 2014) 13
Reed v. *Swatch Group (US) Inc.*,
No: 14-cv-896 (D.N.J. Feb. 12, 2014) 13

TABLE OF AUTHORITIES—continued

Page(s)

Roberson v. *Laborchex Companies, Inc.*,
No. 14-cv-273 (M.D. Ala. Apr. 11, 2014) 13
Robey v. *Shapiro Marianos & Cejda, L.L.C.*,
434 F.3d 1208 (10th Cir. 2006) 16
Robins v. *Spokeo, Inc.*, 742 F.3d 409 (2014)..... 1
Robins v. *Spokeo, Inc.*,
CV10-05306, 2011 WL 597867
(C.D. Cal. Jan. 27, 2011)..... 1
Robins v. *Spokeo, Inc.*,
CV10-05306, 2011 WL 1793334
(C.D. Cal. May 11, 2011)..... 1
Robins v. *Spokeo, Inc.*,
CV10-05306, 2011 WL 11562151
(C.D. Cal. Sept. 19, 2011)..... 1
Scott v. *KKW Trucking, Inc.*,
No. 14-cv-494 (D. Or. Mar. 25, 2014)..... 13
Short v. *Equifax Information Services LLC*,
No. 14-cv-471 (D. Or. Mar. 24, 2014)..... 13
Sierra Club v. *Morton*, 405 U.S. 727 (1972) 21
Smith v. *Microsoft Corp.*,
No. 11-cv-1958, 2012 WL 2975712
(S.D. Cal. July 20, 2012)..... 17
Steed v. *Equifax Information Services, LLC*,
No. 14-cv-437 (N.D. Ga. Feb. 14, 2014)..... 13
Sterk v. *Best Buy Stores, L.P.*,
No. 11 C 1894, 2012 WL 5197901
(N.D. Ill. Oct. 27, 2012)..... 18

TABLE OF AUTHORITIES—continued

Page(s)

Summers v. *Earth Island Inst.*,
555 U.S. 488 (2009) 20
US Fax Law Ctr., Inc. v. *iHire, Inc.*,
362 F. Supp. 2d 1248 (D. Colo. 2005) 17
Vermont Agency of Natural Resources v. *United States ex rel. Stevens*,
529 U.S. 765 (2000) 20
Wallace v. *ConAgra*,
___ F.3d ___, 2014 WL 1356860
(8th Cir. Apr. 4, 2014) 23
Warth v. *Seldin*, 422 U.S. 490 (1975) 8, 20
Wilson v. *Glenwood Intermountain Props., Inc.*,
98 F.3d 590 (10th Cir. 1996) 18

CONSTITUTION, STATUTES, AND RULES

U.S. Const. art. III, § 2 ..... *passim*
28 U.S.C. § 1254(1) 1
28 U.S.C. § 1292(b) 5
Americans With Disabilities Act
42 U.S.C. § 12182(a) 18
42 U.S.C. § 12188 18
Cable Communications Privacy Act
47 U.S.C. § 551(f)(2) 18
Driver's Privacy Protection Act
18 U.S.C. § 2724(a) 18
Electronic Communications Privacy Act
18 U.S.C. § 2520(c) 18

TABLE OF AUTHORITIES—continued

Page(s)

Employee Retirement Income Security Act
29 U.S.C. § 1104(a)(1)(D) 17
29 U.S.C. § 1132(a)(2) 17
Equal Credit Opportunity Act
15 U.S.C. § 1691e(a) 18
Expedited Funds Availability Act
12 U.S.C. § 4010(a)(2) 18
Fair Credit Reporting Act
15 U.S.C. § 1681, *et seq.* 1, 3
15 U.S.C. § 1681b(b)(1) 3
15 U.S.C. § 1681c(g)(1) 15
15 U.S.C. § 1681e(b) 3
15 U.S.C. § 1681e(d) 3
15 U.S.C. § 1681j(a) 3
15 U.S.C. § 1681n(a) 23
15 U.S.C. § 1681n(a)(1) 3
15 U.S.C. § 1681n(a)(2) 3
15 U.S.C. § 1681o(a) 3
Fair Debt Collection Practices Act
15 U.S.C. § 1692f 16
15 U.S.C. § 1692k(a)(2)(B) 16
Fair Housing Act
42 U.S.C. § 3604(c) 17
42 U.S.C. § 3613(a)(1)(A) 18
Homeowners Protection Act
12 U.S.C. § 4907(a)(1) 18

TABLE OF AUTHORITIES—continued

Page(s)

Lanham Act
15 U.S.C. § 1125 17
Migrant and Seasonal Agricultural Worker Protection Act
29 U.S.C. § 1854(a) 18
29 U.S.C. § 1854(c) 18
Real Estate Settlement Procedures Act
12 U.S.C. § 2607 17
12 U.S.C. § 2607(d)(2) 24
Stored Communications Act
18 U.S.C. § 2707(c) 18
Telephone Consumer Protection Act
47 U.S.C. § 227(b) 16
Truth in Lending Act
15 U.S.C. § 1631 16
15 U.S.C. § 1632 16
15 U.S.C. § 1640(a)(2)(B) 16
Video Privacy Protection Act
18 U.S.C. § 2710(b) 18
18 U.S.C. § 2710(c)(1) 18
Fed. R. Civ. P. 23(b)(3) 14

MISCELLANEOUS

David L. Permut & Tamra T. Moore, *Recent Developments in Class Actions: The Fair Credit Reporting Act*, 61 Bus. Law 931 (2006) 12

TABLE OF AUTHORITIES—continued

Page(s)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Spokeo, Inc., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-10a) is reported at 742 F.3d 409. The order of the district court granting defendant's motion to dismiss plaintiff's complaint (App., *infra*, 11a-14a) is unreported but is available at 2011 WL 597867. The order of the district court granting in part and denying in part defendant's motion to dismiss plaintiff's first amended complaint (App., *infra*, 15a-22a) is unreported but is available at 2011 WL 1793334. The order of the district court "correcting prior ruling and finding moot motion for certification," and dismissing the case (App., *infra*, 23a-24a), is unreported but is available at 2011 WL 11562151.

JURISDICTION

The judgment of the court of appeals was entered on February 4, 2014. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, Section 2 of the U.S. Constitution provides that "[t]he judicial Power shall extend to all Cases, in Law and Equity, arising under * * * the Laws of the United States * * * "

The pertinent provisions of the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.*, are reproduced at App., *infra*, 25a-28a.

STATEMENT

This Court recognized the substantial importance of the question presented here when it granted certiorari in *First American Financial Corp.* v. *Edwards*, No. 10-708. But the Court dismissed the writ of certiorari as improvidently granted, and so did not decide whether a technical violation of a federal statute *ipso facto* satisfies the injury-in-fact requirement for Article III standing in the absence of any allegation of concrete and particularized injury. See *First American Financial Corp.* v. *Edwards*, 132 S. Ct. 2536 (2012) (per curiam).

This case presents the same question in the context of a different, frequently litigated federal statute—the Fair Credit Reporting Act. And this case provides a cleaner vehicle. Unlike in *First American*—where the statutory private action and remedy at issue were predicated on the plaintiff's payment of money to the defendant—no such payment took place here. Instead, in the uncluttered context of this case the Ninth Circuit underscored its view that a mere statutory injury-in-law—standing alone—is sufficient to satisfy the Article III injury-in-fact requirement even when the plaintiff did not sustain *any* tangible harm.

Whether Congress can create Article III standing by authorizing a remedy for a bare statutory violation is a recurring question under the FCRA and a wide variety of other federal laws. The courts of appeals have delivered conflicting answers. Unless this Court steps in, the extent and limits of federal jurisdiction will continue to vary circuit by circuit and case by case. And in those circuits where a harmless statutory violation has been held sufficient to confer

standing, class actions presenting huge damages exposure based on harmless conduct will proliferate.

Because this fundamental and unsettled question of Article III jurisdiction has enormous practical significance, this Court's review is plainly warranted.

A. The Statutory Scheme.

The Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681 *et seq.*, imposes specific obligations on "consumer reporting agencies" with respect to the consumer information they transmit. As pertinent here, the FCRA limits the circumstances in which consumer reporting agencies may provide "consumer reports for employment purposes" (15 U.S.C. § 1681b(b)(1)) and requires such agencies to "follow reasonable procedures to assure maximum possible accuracy of" consumer reports (*id.* § 1681e(b)); to issue notices to providers and users of information (*id.* § 1681e(d)); and to post toll-free telephone numbers to allow consumers to request consumer reports (*id.* § 1681j(a)). See App., *infra*, 4a-5a.

A negligent violation of these requirements "with respect to any consumer" subjects a consumer reporting agency to "actual damages," attorney's fees, and costs. *Id.* § 1681o(a). For a "willful" violation, however, a consumer may choose between "actual damages" and statutory "damages of not less than $100 or not more than $1,000," *id.* § 1681n(a)(1), and also may seek punitive damages. *Id.* § 1681n(a)(2).

B. Factual Background And District Court Proceedings.

Petitioner Spokeo, Inc., operates a "people search engine"—it aggregates publicly available information regarding individuals from phone books, social networks, marketing surveys, real estate listings, busi-

ness websites, and other sources into a database that is searchable via the Internet using an individual's name, and displays the results of searches in an easy-to-read format. During the time relevant to this action, the bottom of every search results page stated:

> Spokeo does not verify or evaluate each piece of data, and makes no warranties or guarantees about any of the information offered. Spokeo does not possess or have access to secure or private financial information.

C.A. Supp. Excerpts of Record (ER) 22.

In particular, Spokeo warned its users that "none of the information offered by Spokeo is to be considered for purposes of determining any entity or person's eligibility for credit, insurance, employment, or for any other purposes covered under FCRA." *Ibid.* Additionally, to access the "Wealth" section of search results, users had to agree that "[n]one of the information offered by Spokeo is to be considered for purposes of determining a consumer's eligibility for credit, insurance, employment, or for any other purpose authorized under the FCRA." C.A. Supp. ER 25.

Respondent Thomas Robins instituted a putative class action against Spokeo, alleging that Spokeo is a "consumer reporting agency" that issues "consumer reports" in violation of the FCRA.[1] See App., *infra*, 19a-20a. Robins alleged that the search results associated with his name included inaccurate information indicating that he has more education and professional experience than he actually has, that he

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[1] Spokeo disputes Robins's claims that it is a "consumer reporting agency" within the meaning of FCRA, and that its search engine results are "consumer reports."

is married (although in fact he is not), and that he is better situated financially than he really is. App., *infra*, 2a; C.A. ER 40:7 ¶¶ 31-32. He did not allege that he had contacted Spokeo to ask it to correct or remove the search results pertaining to him.

The district court dismissed the complaint with leave to amend, holding that Robins had failed to allege an injury in fact because he had not alleged "any actual or imminent harm." See App., *infra*, 2a. The court paraphrased Robins's allegations as stating "that he has been unsuccessful in seeking employment, and that he is concerned that the inaccuracies in his report will affect his ability to obtain credit, employment, insurance, and the like." *Ibid.* The court stated that allegations of possible future injury do not satisfy Article III standing requirements. *Ibid.*

The amended complaint alleged that the inaccurate information collected in Spokeo's search results had caused actual harm to Robins's "employment prospects." App., *infra*, 2a. Robins's continued unemployment, he alleged, had cost him money and caused "anxiety, stress, concern, and/or worry about his diminished employment prospects." *Ibid.* The district court initially held that Spokeo's "marketing of inaccurate consumer reporting information about" Robins amounted to injury-in-fact. App., *infra*, 3a. After Spokeo sought certification of an interlocutory appeal under 28 U.S.C. § 1292(b), however, the district court reconsidered its views and dismissed the case with prejudice based on the Article III analysis in its original dismissal order. *Ibid.*

C. The Court of Appeals' Decision.

The Ninth Circuit reversed, holding that the "creation of a private cause of action to enforce a statutory provision implies that Congress intended

the enforceable provision to create a statutory right," and that "the violation of a statutory right is usually a sufficient injury in fact to confer standing." App., *infra*, 6a (citing *Edwards* v. *First American Corp.*, 610 F.3d 514, 517 (9th Cir. 2010), cert. granted, 131 S. Ct. 3022 (2011), cert. dismissed as improvidently granted, 132 S. Ct. 2536 (2012)).

Because "the statutory cause of action does not require a showing of actual harm when a plaintiff sues for willful violations," App., *infra*, 6a, the court reasoned, actual harm is unnecessary to establish injury in fact. Instead, the court held that Robins had satisfied the requirements for Article III standing because "he allege[d] that Spokeo violated *his* statutory rights, not just the statutory rights of other people," and because his "personal interests in the handling of his credit information are individualized rather than collective." App., *infra*, 8a. Thus, the court of appeals concluded, "alleged violations of Robins's statutory rights are sufficient to satisfy the injury-in-fact requirement of Article III." *Ibid.*

The court of appeals specifically refused to rest its ruling on the alleged harm to Robins's employment prospects and related anxiety: "[b]ecause we determine that Robins has standing by virtue of the alleged violations of his statutory rights, we do not decide whether [the alleged harms] could be sufficient injuries in fact." App., *infra*, 9a n.3. The court of appeals declined to construe the statutory damages provision as an alternate measure of damages rather than a substitute for injury-in-fact, perceiving no "difficult constitutional questions" to be avoided. App., *infra*, 6a-7a n.2.

The Ninth Circuit recognized that its analysis had the practical effect of turning the three-part test

for Article III standing into a single-factor inquiry that was satisfied by the availability of a statutory remedy. *See* App., *infra*, 9a. As the court of appeals put it, "[w]hen the injury in fact is the violation of a statutory right * * * inferred from the existence of a private cause of action, causation and redressability will usually be satisfied." *Ibid.* Causation is self-evident, because the statutory violation *is* the injury. *Ibid.* And the presence of a statutory remedy guarantees redressability, since there is no injury to redress apart from the statutory violation itself. *Ibid.*

REASONS FOR GRANTING THE PETITION

To establish standing (and thus federal jurisdiction) under Article III, a plaintiff bears the burden of showing that he

> (1) * * * has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Friends of the Earth, Inc. v. *Laidlaw Envtl. Servs, Inc.*, 528 U.S. 167, 180–81 (2000).

The injury-in-fact requirement is the "irreducible constitutional minimum" for standing. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). Yet the Ninth Circuit held that requirement satisfied by a statutory violation that is unaccompanied by any concrete harm to the plaintiff. That holding has the practical effect of collapsing the three-part standing inquiry into the single question whether the plaintiff has been subjected to a statutory violation. As the

court of appeals itself acknowledged, "[w]hen the injury in fact is the violation of a statutory right * * * inferred from the existence of a private cause of action, causation and redressability will usually be satisfied." App., *infra*, 9a.

The decision below—along with those of two other circuits—directly conflicts with the decisions of at least two other courts of appeals. Those courts have held that a plaintiff pursuing a statutory cause of action still must demonstrate a concrete injury-in-fact (as opposed to a mere injury-in-law) in order to establish Article III standing.

The conflict arises in part from a statement by this Court. The Court has held with unmistakable clarity "that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing." *Raines* v. *Byrd*, 521 U.S. 811, 820 n.3 (1997). Yet several courts of appeals have disregarded this "settled" principle (*ibid.*) in favor of what they perceive to be a contrary rule expressed in *Warth* v. *Seldin*, 422 U.S. 490, 500 (1975) (internal quotation marks omitted): "The actual or threatened injury required by Art. III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing." App., *infra*, 5a (quoting *Warth*).

The need to resolve the conflict is especially acute because this fundamental question of Article III jurisdiction has significant implications for class action litigation under a statute that generates dozens of class actions in the federal courts every year. The Court should grant review.

A. The Courts Of Appeals Are Divided Over Whether An Injury-In-Law Satisfies Article III's Injury-In-Fact Requirement.

The division among the courts of appeals regarding whether a statutory violation, unaccompanied by any concrete injury, is sufficient to establish Article III standing leaves no doubt that if this case had been filed in the Second or Fourth Circuits the district court's order of dismissal would have been affirmed rather than reversed.

To begin with, the Sixth Circuit—like the Ninth Circuit in this case—has held that a plaintiff had Article III standing to bring a FCRA action against a check verification service even though she never had a check rejected or suffered any other consequence of the challenged practice. *Beaudry* v. *TeleCheck Services, Inc.*, 579 F.3d 702, 705–07 (6th Cir. 2009). And the Seventh Circuit, in reversing a denial of class certification, has held (without mentioning Article III) that statutory damages are available under FCRA "without proof of injury." *Murray* v. *GMAC Mortgage Corp.*, 434 F.3d 948, 952–53 (7th Cir. 2006).[2]

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[2] District courts within the Seventh Circuit have concluded that *Murray* controls the Article III inquiry. *E.g.*, *Armes* v. *Sogro, Inc*, 932 F. Supp. 2d 931, 937–38 (E.D. Wis. 2013); *Brittingham* v. *Cerasimo, Inc.*, 621 F. Supp. 2d 646, 649–50 (N.D. Ind. 2009). And although the Seventh Circuit has not directly addressed the Article III question, it has recently reiterated the holding in *Murray* that "entitlement to statutory damages" does not "require any showing of injury of any sort." *Chapman* v. *Wagener Equities, Inc.*, __ F.3d __, No. 14-8004, 2014 WL 1272786, at *1 (7th Cir. Mar. 31, 2014) (construing Telephone Consumer Protection Act).

Although the Fourth Circuit has not addressed the issue in the context of the FCRA, it has—in the context of an ERISA action—squarely rejected the argument that, in the absence of any concrete injury, the mere "deprivation of [a] statutory right * * * is sufficient to constitute an injury-in-fact for Article III standing." *David* v. *Alphin*, 704 F.3d 327, 338-39 (4th Cir. 2013). The court forthrightly declared that "this theory of Article III standing is a non-starter as it conflates statutory standing with constitutional standing." *Ibid.*

The Second Circuit has reached the same conclusion, squarely rejecting the argument that "either an alleged breach of fiduciary duty to comply with ERISA, or a deprivation of [the plaintiff's] entitlement to that fiduciary duty, in and of themselves constitutes an injury-in-fact sufficient for constitutional standing." *Kendall* v. *Employees Retirement Plan of Avon Prods.*, 561 F.3d 112, 121 (2d Cir. 2009). The court explained that although "plan fiduciaries have a statutory duty to comply with ERISA," a plaintiff cannot maintain a claim for breach of that duty without also "alleg[ing] some injury or deprivation of a specific right that arose from a violation of th[e] duty." *Ibid.*

Faced with a FCRA claim for statutory damages in the absence of concrete injury, the Second and Fourth Circuits would be obligated to apply these precedents and hold that the plaintiffs lack Article III standing. The court below took precisely that approach to its own (diametrically opposite) precedent, applying in the FCRA context its prior holding in *Edwards* v. *First American Corp.*, 610 F.3d 514, 517 (9th Cir. 2010)), cert. granted, 131 S. Ct. 3022 (2011), cert. dismissed as improvidently granted, 132 S. Ct. 2536 (2012) (involving a claim under Real Estate

Settlement Procedures Act (RESPA)). See App., *infra*, 6a (citing *Edwards*). And it is what the Sixth Circuit did in *Beaudry*, applying to FCRA its decision in *Carter* v. *Welles-Bowen Realty, Inc.*, 553 F.3d 979, 989 (6th Cir. 2009) (also involving a RESPA claim). See 579 F.3d at 705–07.[3]

While it is abundantly clear that the circuits are in marked disagreement over whether, as a general matter, Congress can create constitutional standing in the absence of actual injury, a square conflict in the FCRA context in particular is unlikely to develop.

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[3] Like the Second and the Fourth Circuits, the Third Circuit has twice held that plaintiffs must allege actual injury—not just a violation of a federal statute—to establish Article III standing. For example, the Third Circuit held that Article III standing is lacking in suits for false advertising under the Lanham Act unless the plaintiffs allege that they were actually harmed by the challenged conduct. See *Joint Stock Soc'y* v. *UDV North America, Inc.*, 266 F.3d 164, 176 (3d Cir. 2001) (Alito, J.) (no "injury in fact" from defendants' use of Smirnoff trade name where plaintiffs "never marketed any vodka in the United States"). See also *Fair Housing Council* v. *Main Line Times*, 141 F.3d 439, 443-44 (3d Cir. 1998) (plaintiff who was not actually deterred by discriminatory advertising lacked standing because "a violation of the Act does not automatically confer standing on any plaintiff, even one who holds the status of a private attorney general"); *Doe* v. *National Board of Medical Examiners*, 199 F.3d 146, 153 (3d Cir. 1999) (Becker, C.J., joined by Scirica and Alito, JJ.) ("The proper analysis of standing focuses on whether the plaintiff suffered an actual injury * * * [.] Congress * * * cannot confer standing by statute alone") (discussing Americans with Disabilities Act and finding standing). But see *Alston* v. *Countrywide Financial Corp.*, 585 F.3d 753, 763 (3d Cir. 2009) (holding that "[a] plaintiff need not demonstrate that he or she suffered actual monetary damages" to have Article III standing to sue under the RESPA, without acknowledging contrary circuit precedents, which were not cited in the defendant's brief (see 2009 WL 7170604)).

That is so in light of the decision below and those of the Sixth Circuit in *Beaudry*, the Seventh Circuit in *Murray* (see note 2, *supra*), and the Eighth Circuit's similarly reasoned Article III standing decision under a different statute, see *Charvat* v. *Mutual First Federal Credit Union*, 725 F.3d 819, 822-825 (8th Cir. 2013), cert. denied, 134 S. Ct. 1515 (2014) (Electronic Funds Transfer Act). In almost every case plaintiffs' counsel can choose to bring nationwide class actions under FCRA in one of these four circuits that equate statutory injury-in-law with Article III injury-in-fact—and thereby avoid dismissal under the standards applied in the Second and Fourth Circuits.

In sum, there is broad-based and long-standing disagreement in the lower courts over whether Article III places limitations on Congress's ability to create constitutional standing. That fundamental conflict is ripe for resolution by this Court.

B. Injury-In-Law Class Actions Under FCRA Seeking Huge Damages Are Being Filed With Increasing Frequency.

Class actions invoking the FCRA, and grounded in the injury-in-law theory upheld in this case, are being filed with great frequency. "In the 40 years since FCRA was enacted, litigation has skyrocketed."[4] Indeed, at least 29 putative class actions claim-

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[4] Jonathan D. Jerison & Bradley A. Marcus, *A Brief History of the FCRA and the Potential for New Litigation After Dodd-Frank*, Consumer Fin. Services L. Rep., Apr. 13, 2011, at 3, 4; see also David L. Permut & Tamra T. Moore, *Recent Developments in Class Actions: The Fair Credit Reporting Act*, 61 Bus. Law. 931 (2006) (noting the "proliferation of class action lawsuits brought under" FCRA that "combined with certain class action-friendly provisions of FCRA—such as the availability of fee shifting and statutory damages, and the lack of a class ac-

ing statutory damages under FCRA have been filed in *the first four months of this year* alone.[5] And those lawsuits target a broad range of businesses. As this

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tion damages cap—have * * * push[ed] the FCRA to the forefront of consumer financial services class litigation.").

[5] See *Broberg* v. *Experian Information Solutions, Inc.*, No. 14-cv-49 (D. Minn. Jan. 6, 2014); *Lunds* v. *Johns Pizza Cafe Ltd.*, No. 14-cv-63 (D. Minn. Jan. 7, 2014); *Gonzalez* v. *Harris Ranch*, No. 14-cv-38 (E.D. Cal. Jan. 10, 2014); *Haber* v. *Bank of America, N.A.*, No. 14-cv-169 (E.D. Pa. Jan. 13, 2014); *Corliss* v. *Providence Health & Services*, No. 14-cv-119 (D. Or. Jan. 23, 2014); *Pekelney* v. *Horizon Healthcare Services, Inc.*, No. 14-cv-584 (D.N.J. Jan. 28, 2014); *Patel* v. *Trans Union, LLC*, No. 14-cv-522 (N.D. Cal. Feb. 4, 2014); *Henderson* v. *HR Plus*, No. 14-cv-82 (E.D. Va. Feb. 6, 2014); *Gezahegne* v. *Whole Foods Market California, Inc.*, No. 14-cv-592 (N.D. Cal. Feb. 7, 2014); *Lozano-Rivera* v. *Universal City Nissan Inc.*, No. 14-cv-1010 (C.D. Cal. Feb. 10, 2014); *Carsten* v. *University of Miami*, No. 14-cv-20497 (S.D. Fla. Feb. 10, 2014); *Reed* v. *Swatch Group (US) Inc.*, No: 14-cv-896 (D.N.J. Feb. 12, 2014); *Reed* v. *Golf & Tennis Pro Shop, Inc.*, No. 14-cv-895 (D.N.J. Feb 12, 2014); *Steed* v. *Equifax Information Services, LLC*, No. 14-cv-437 (N.D. Ga. Feb. 14, 2014); *Myers* v. *National Tenant Network, Inc.*, No. 14-cv-327 (D. Or. Feb. 26, 2014); *Brown* v. *Delhaize America, LLC*, No. 14-cv-195 (M.D.N.C Mar. 7, 2014); *Knights* v. *Publix Super Markets, Inc.*, No. 14-cv-720 (M.D. Tenn. Mar. 12, 2014); *Plasters* v. *UBS Financial Services, Inc.*, No. 14-cv-1659 (D.N.J Mar. 14, 2014); *Hathaway* v. *Whole Foods Market California, Inc.*, No. 14-cv-663 (S.D. Cal. Mar. 21, 2014); *Ford* v. *CEC Entertainment, Inc.*, No. 14-cv-677 (S.D. Cal. Mar. 24, 2014); *Henderson* v. *Wal-Mart Stores*, No. 14-cv-208 (E.D. Va. Mar. 24, 2014); *Short* v. *Equifax Information Services LLC*, No. 14-cv-471 (D. Or. Mar. 24, 2014); *Scott* v. *KKW Trucking, Inc.*, No. 14-cv-494 (D. Or. Mar. 25, 2014); *Ragland* v. *Guardsmark, LLC*, No. 14-cv-693 (S.D. Cal. Mar. 26, 2014); *Dell'Olio* v. *HCA HealthONE, LLC*, No. 14-cv-885 (D. Colo. Mar. 26, 2014); *Henderson* v. *First Advantage Background Services Corp.*, No. 14-cv-221 (E.D. Va. Mar. 28, 2014); *Manuel* v. *Wells Fargo Bank*, No. 14-cv-238 (E.D. Va. Apr. 1, 2014); *Avery* v. *Werner Enterprises, Inc.*, No. 14-cv-330 (W.D. Mo. Apr. 9, 2014); *Roberson* v. *Laborchex Companies, Inc.*, No. 14-cv-273 (M.D. Ala. Apr. 11, 2014).

case demonstrates, FCRA class actions are being filed with increasing frequency against employers and other entities that are not traditional "consumer reporting agencies," but cannot escape the litigation (and potentially massive exposure) at the pleading stage.[6]

Moreover, the interaction between a no-injury theory of standing and the class action device means that enormous potential liability may result even though no one has suffered *any* concrete injury. The decision below not only lowers the bar for plaintiffs to bring such actions and survive dismissal; it also has the practical effect of relaxing Rule 23's "stringent requirements for [class] certification," *American Express Co.* v. *Italian Colors Restaurant*, 133 S. Ct. 2304, 2310 (2013), because—once the presence of actual harm is out of the equation—issues of injury and causation will be claimed to be much more susceptible to common proof. That is exactly what happened in *Murray*, where the Seventh Circuit—reversing a denial of class certification—held that individualized issues as to injury and damages did not preclude class certification precisely because, in that court's view, statutory damages were available "without proof of injury." 434 F.3d at 952–53.

Magnifying the issue's practical significance, at least two courts of appeals addressing the FCRA remedial provision at issue here have rejected challenges to class certification, declaring class adjudication "superior" (Fed. R. Civ. P. 23(b)(3)) even when

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[6] See note 5, *supra*; see also, *e.g.*, *Ellis* v. *Swift Transp. Co. of Ariz., LLC*, No. 13-cv-00473, Dkt. 36–1 (E.D. Va. Apr. 21, 2014) (proposing settlement for $4.4 million of putative class action that alleged that a trucking company willfully violated the FCRA through its use of consumer reports in its hiring process).

that device threatens to impose billions in damages for technical violations causing infinitesimal harm or no harm at all. See *Murray*, 434 F.3d at 952–53; *Bateman* v. *American Multi-Cinema, Inc.*, 623 F.3d 708 (9th Cir. 2010).[7]

The implication is drastic and absurd: the lesser the injury, the easier the path to class certification, the broader the class, the greater the damages exposure, and—inevitably—the larger the settlement. As this Court has put it, "[w]hen damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable. Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims." *AT&T Mobility LLC* v. *Concepcion*, 131 S. Ct. 1740, 1752 (2011); see also *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 741 (1975) (noting risk of *in terrorem* settlements).

This case imposes a similar threat of extraordinary settlement pressure regardless of the merits. Respondent alleges that the putative class he seeks to represent "consists of millions of individuals" on whose behalf he hopes to recover "the maximum statutory damages available under" FCRA—*i.e.*, $1000 per violation. C.A. ER 40:8 ¶ 39, 40:13 ¶ 65, 40:14 ¶¶ 71, 75. In other words, if a class were certified in this case, the potential exposure reaches into the billions of dollars.

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[7] FCRA class actions include litigation (like *Bateman*) under the Fair and Accurate Credit Transactions Act (FACTA), a FCRA provision that governs information on credit-card receipts (see 15 U.S.C. § 1681c(g)(1)) but is subject to standard FCRA remedies and presents identical standing issues.

In light of the high volume of FCRA class actions in the federal courts and the massive stakes at issue, review by this Court is warranted to decide whether those cases may be brought by plaintiffs who lack genuine, concrete injuries.

C. A Decision In This Case Would Resolve Similar Issues Presented Under A Wide Range Of Federal Statutes.

Review here would have the additional practical benefit of resolving the same constitutional issue as it arises under many more federal statutes. Among those statutes are:

- The Truth in Lending Act, which imposes requirements on financial institutions that extend credit to consumers (see 15 U.S.C. §§ 1631-1632) and provides for awards of actual and statutory damages (see 15 U.S.C. § 1640(a)(2)(B)).[8]
- The Fair Debt Collection Practices Act, which prohibits using certain "means to collect or attempt to collect any debt" (15 U.S.C. § 1692f) and imposes liability for actual and statutory damages (see *id.* § 1692k(a)(2)(B)).[9]
- The Telephone Consumer Protection Act, which regulates telephone solicitations and provides for statutory damages. See 47 U.S.C. § 227(b).[10]

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[8] See, *e.g.*, *DeMando* v. *Morris*, 206 F.3d 1300, 1303 (9th Cir. 2000).

[9] See, *e.g.*, *Robey* v. *Shapiro Marianos & Cejda, L.L.C.*, 434 F.3d 1208, 1212 (10th Cir. 2006).

[10] See *Chapman* v. *Wagener Equities, Inc.*, __ F.3d __, No. 14-8004, 2014 WL 1272786, at *1 (7th Cir. Mar. 31, 2014) ("Nor

- The Employee Retirement Income Security Act, which imposes fiduciary duties on sponsors of retirement plans, including a duty to act in accordance with plan terms that are consistent with ERISA's requirements (see 29 U.S.C. § 1104(a)(1)(D)), and authorizes plan participants to bring civil actions against plan fiduciaries for breaches of those duties (see *id.* § 1132(a)(2)).[11]
- The Real Estate Settlement Procedures Act, which prohibits kickbacks in certain mortgage-loan transactions. See 12 U.S.C. § 2607.[12]
- The Lanham Act, which prohibits false advertising and authorizes civil actions for violations. See 15 U.S.C. § 1125.[13]
- The Fair Housing Act, which forbids discriminatory advertising for apartments (see 42 U.S.C. § 3604(c)) and creates a private right

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does entitlement to statutory damages require any showing of injury of any sort * * * ."). See also, *e.g.*, *Palm Beach Golf Ctr.–Boca, Inc.* v. *Sarris*, __ F. Supp. 2d __, No. 12-80178-CIV, 2013 WL 5972173, at *11-12 (S.D. Fla. Oct. 22, 2013); *Manno* v. *Healthcare Revenue Recovery Group, LLC*, 289 F.R.D. 674, 682 (S.D. Fla. 2013); *Smith* v. *Microsoft Corp.*, No. 11-cv-1958, 2012 WL 2975712, at *3-4 (S.D. Cal. July 20, 2012); *US Fax Law Ctr., Inc.* v. *iHire, Inc.*, 362 F. Supp. 2d 1248, 1252-1253 (D. Colo. 2005).

[11] See, *e.g.*, *David* v. *Alphin*, 704 F.3d 327, 338-39 (4th Cir. 2013); *Kendall* v. *Employees Retirement Plan of Avon Prods.*, 561 F.3d 112, 121 (2d Cir. 2009).

[12] See, *e.g.*, *Alston* v. *Countrywide Financial Corp.*, 585 F.3d 753, 763 (3d Cir. 2009); *Carter* v. *Welles-Bowen Realty, Inc.*, 553 F.3d 979, 989 (6th Cir. 2009).

[13] See, *e.g.*, *Joint Stock Soc'y* v. *UDV North American, Inc.*, 266 F.3d 164, 176 (3d Cir. 2001).

of action to challenge discriminatory housing practices in federal court (see *id.* § 3613(a)(1)(A)).[14]

- The Americans with Disabilities Act, which prohibits discrimination on the basis of disability in public accommodations (see 42 U.S.C. § 12182(a)) and authorizes suits by private persons to enjoin such discrimination (see *id.* § 12188).[15]
- The Video Privacy Protection Act, 18 U.S.C. § 2710(b), which prohibits a "video tape service provider" from knowingly disclosing personally identifiable information concerning any consumer, and authorizes consumer lawsuits, *id.* § 2710(c)(1).[16]

Many more federal statutes contain statutory damages provisions.[17] Litigation under those laws is

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[14] See, *e.g.*, *Fair Housing Council* v. *Main Line Times*, 141 F.3d 439, 443-44 (3d Cir. 1998); *Wilson* v. *Glenwood Intermountain Props., Inc.*, 98 F.3d 590, 593-94 (10th Cir. 1996).

[15] See, *e.g.*, *Doe* v. *National Board of Medical Examiners*, 199 F.3d 146, 153 (3d Cir. 1999).

[16] See, *e.g.*, *In re Hulu Privacy Litig.*, No. C 11-03764, 2013 WL 6773794, at *4-5, *8-9 (N.D. Cal. Dec. 20, 2013) (following *Edwards* and finding no injury necessary beyond disclosure in violation of VPPA); *Sterk v. Best Buy Stores, L.P.*, No. 11 C 1894, 2012 WL 5197901, at *7-9 (N.D. Ill. Oct. 27. 2012) (dismissing for want of injury-in-fact despite statutory violation).

[17] See, *e.g.*, Electronic Communications Privacy Act, 18 U.S.C. § 2520(c); Stored Communications Act, 18 U.S.C. § 2707(c); Cable Communications Privacy Act, 47 U.S.C. § 551(f)(2); Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. § 1854(a), (c); Expedited Funds Availability Act, 12 U.S.C. § 4010(a)(2); Homeowners Protection Act, 12 U.S.C. § 4907(a)(1); Equal Credit Opportunity Act, 15 U.S.C. § 1691e(a); Driver's Privacy Protection Act, 18 U.S.C. § 2724(a).

likely to raise the question presented here.[18] And some courts have extended the same principles to state statutes.[19]

The Ninth Circuit's holding would afford plaintiffs Article III standing whenever they bring private actions under any of these statutes—regardless of whether they plead actual harm—so long as they allege a bare statutory violation with some connection to them. Review by this Court would ensure that the lower courts are acting within the scope of their constitutional authority in a broad range of statutory settings beyond FCRA.

D. The Ninth Circuit's Decision Is Contrary To This Court's Standing Jurisprudence.

Review is warranted for the additional reason that the decision below cannot be reconciled with this Court's Article III standing precedents.

1. It long has been "settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing." *Raines* v. *Byrd*, 521 U.S. 811, 820 n.3 (1997) (citing *Gladstone, Realtors* v. *Village of Bellwood*, 441 U. S. 91, 100 (1979)).

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[18] For example, although to our knowledge the Article III question has not squarely arisen under the Electronic Communications Privacy Act or the Stored Communications Act, at least one district court has held that the statutory damages provisions in those laws obviate any inquiry into whether plaintiffs "suffered damage or loss." *Harris* v. *comScore, Inc.*, 292 F.R.D. 579, 589 (N.D. Ill. 2013).

[19] See, *e.g.*, *C.M.D.* v. *Facebook, Inc.*, No. C 12-1216, 2014 WL 1266291, at *2-3 (N.D. Cal. Mar. 26, 2014) (Illinois statute); *Deacon* v. *Pandora Media, Inc.*, 901 F. Supp. 2d 1166, 1171-72 (N.D. Cal. 2012) (Michigan statute).

"In no event * * * may Congress abrogate the Art. III minima: A plaintiff must always have suffered a distinct and palpable injury to himself * * * that is likely to be redressed if the requested relief is granted." *Gladstone*, 441 U.S. at 100 (internal quotation marks omitted). This "requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute." *Summers* v. *Earth Island Inst.*, 555 U.S. 488, 497 (2009).

The court below (App., *infra*, 5a), and other courts similarly inclined, have subordinated those principles to this Court's earlier passing observation that "[t]he actual or threatened injury required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing." *Warth* v. *Seldin*, 422 U.S. 490, 500 (1975) (quoting *Linda R.S.* v. *Richard D.*, 410 U.S. 614, 617 n.3 (1973)). But that statement does not mean that Congress can manufacture Article III standing when the asserted injury is insufficiently concrete to satisfy Article III's injury-in-fact requirement. Nor is it enough (as the Ninth Circuit believed, see App., *infra*, 8a) that the interest addressed by the statutory violation is individual to the plaintiff rather than collective. "An interest unrelated to injury in fact is insufficient to give a plaintiff standing." *Vermont Agency of Natural Resources* v. *United States ex rel. Stevens*, 529 U.S. 765, 772 (2000).

[1] As this Court recently reiterated, injury-in-fact requires not only "an invasion of a legally protected interest," but one that is both "(a) concrete and particularized, and (b) 'actual or imminent, not "conjectural" or "hypothetical."'" *Arizona Christian School Tuition Organization* v. *Winn*, 131 S. Ct. 1436, 1442 (2011) (quoting *Lujan*, 504 U.S. at 560).

Congress may accomplish a "'[s]tatutory broadening of the categories of injury that may be alleged in support of standing,'" but not by "'abandoning the requirement that the party seeking review must himself have suffered an injury.'" *Lujan*, 504 U.S. at 578 (quoting *Sierra Club* v. *Morton*, 405 U.S. 727, 738 (1972)) (brackets omitted). If there is an actual, palpable injury—i.e., one that could qualify as an "injury in fact" under Article III—but no remedy at law, Congress may create a remedy. See *ibid.* In other words, Congress may "elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law." *Ibid.*; see also Hart & Wechsler's The Federal Courts and the Federal System 144 (Richard H. Fallon Jr. et al. eds., 6th ed. 2009).

But Congress may not create the necessary underlying injury by fiat. See *Lujan*, 504 U.S. at 578. No plaintiff can enforce every legal obligation that involves her in some way; she can "enforce" only those "specific legal obligations whose violation works a direct harm" to her that is actual and concrete within the meaning of Article III. *Allen* v. *Wright*, 468 U.S. 737, 761 (1984).

The decision below—like many lower court decisions before it—departs from these firmly established constitutional principles. The Ninth Circuit held that Robins alleged an injury sufficient to satisfy Article III by alleging that Spokeo violated FCRA when it retransmitted inaccurate personal information about him, without alleging a sufficient allegation of tangible harm.

That circular approach to injury would render the case-or-controversy requirement of Article III an empty formality. In excusing a plaintiff from showing

an *actual* injury-in-fact, the decision below necessarily excuses a showing of causation as well. Where the only injury arises from a violation of legal duty that had no effect on the plaintiff, there is nothing to cause, and thus no meaning to the "causal connection" that is otherwise required. *Arizona Christian*, 131 S. Ct. at 1442.

As a consequence, the three-part test of Article III standing—injury-in-fact, causation, and redressability—would collapse into the single question of redressability. Once a congressionally authorized remedy made an abstract complaint "redressable" in the sense that the plaintiff could seek and collect payment, anyone identified in a statute would have standing. The Ninth Circuit recognized and embraced this anomaly. See App., *infra*, 9a.

If the Ninth Circuit were correct, Congress could expand the jurisdiction of the federal courts by authorizing statutory damages for violation of any federal requirement. But Article III's actual injury requirement cannot be evaded simply by making damages available even when injury is absent.

2. Further review is warranted for the additional reason that the serious constitutional questions raised by the decision below, and many others like it, are the unnecessary result of an overbroad statutory construction. "A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score." *Almendarez-Torres* v. *United States*, 523 U.S. 224, 237 (1998) (citation and quotation marks omitted). Accordingly, where a statute is "genuinely susceptible to two constructions," a court is obligated to choose the one that avoids constitutional doubt. *Id.* at 238.

The FCRA can readily be construed in that manner. As the Eighth Circuit has observed, "[a] reasonable reading of the statute could still require proof of actual damages but simply substitute statutory rather than actual damages for the purpose of calculating the damage award." *Dowell* v. *Wells Fargo Bank, NA*, 517 F.3d 1024, 1026 (8th Cir. 2008). Under that construction, because it can be difficult to prove the *amount* of damages resulting from a failure to comply with FCRA's procedural provisions, plaintiffs who have been *concretely* harmed by willful noncompliance need not *quantify* the harm.[20] This interpretation of Section 1681n(a) of FCRA would not affect the need to show a concrete and particularized injury-in-fact sufficient to satisfy Article III. The federal courts should not "presume—without any basis in the statutory text * * * and in contradiction to long-settled constitutional precedent, see, *e.g.*, *Lujan*, 504 U.S. at 560—that Congress intended to stretch, if not breach, the constitutional limits on federal jurisdiction." *Wallace* v. *ConAgra*, __ F.3d __, 2014 WL 1356860, at *5 (8th Cir. Apr. 4, 2014). Review is warranted to reinvigorate that principle as it applies to the interpretation of private causes of action for violations of federal statutes.

E. This Case Cleanly Presents The Injury-In-Law Question.

This case presents an appropriate vehicle to resolve the question left open by the dismissal of certiorari in *First American*. Unlike the plaintiff in that case, who had paid money to the defendant in a

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[20] Cf. *Doe* v. *Chao*, 540 U.S. 614, 621 (2004) (construing Privacy Act recovery to require actual damages in light of "traditional understanding that tort recovery requires * * * proof of some harm for which damages can reasonably be assessed").

commercial transaction that her lawsuit challenged, Robins did not enter into a commercial transaction with Spokeo and has not paid Spokeo a dime (as frequently is the case in FCRA claims).[21]

Moreover, unless the mere existence of the alleged FCRA violation is sufficient to satisfy Article III, Robins cannot establish standing. In "allegations of injury" that the Ninth Circuit conceded were "sparse," App., *infra*, 2a, Robins asserted that the very existence of inaccurate information about him harmed his "prospects" for employment, and that he was anxious about the possibility that a prospective employer might see that information and use it adversely against him.

This "highly attenuated chain of possibilities * * * does not satisfy the requirement that threatened injury must be certainly impending" to satisfy Article III. *Clapper* v. *Amnesty International USA*, 133 S. Ct. 1138, 1148 (2013). This Court recently "decline[d] to abandon [its] usual reluctance to endorse standing theories that rest on speculation about the decisions of independent actors" like the unknown employers who might have seen Robins's Spokeo search results. *Id.* at 1150. And Robins's pleaded anxiety and stress about his speculation is as insufficient to satisfy the injury-in-fact requirement as was the "subjective fear of surveillance" that this Court found wanting in *Clapper*, *id.* at 1153-1153.

In short, this case provides a clear path to the resolution of the important question presented.

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[21] Indeed, the remedial provision involved in *First American* imposed liability for "three times the amount of *any charge paid*" to the defendant. 12 U.S.C. § 2607(d)(2) (emphasis added).

* * *

By equating a statutory injury-in-law with an Article III injury-in-fact, the Ninth Circuit has opened the federal courts to a large class of lawsuits that do not satisfy Article III. Review by this Court is warranted to ensure that the jurisdiction asserted by the federal courts remains within constitutional limits.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MAY 2014

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THOMAS ROBINS, individually and on behalf of all others similarly situated, *Plaintiff–Appellant,* v. SPOKEO, INC., a California corporation, *Defendant–Appellee.*	No. 11-56843 D.C. No. 2:10-cv-5306-ODW-AGR

Appeal from the United States District Court
For the Central District of California
Otis D. Wright, II, District Judge, Presiding

Argued and Submitted
November 6, 2013—Pasadena, California

Filed February 4, 2014

Before: Diarmuid F. O'Scannlain, Susan P. Graber, and Carlos T. Bea, Circuit Judges

OPINION

O'SCANNLAIN, Circuit Judge:

We must decide whether an individual has Article III standing to sue a website's operator under the Fair Credit Reporting Act for publishing inaccurate personal information about himself.

I

Spokeo, Inc. operates a website that provides users with information about other individuals, including

contact data, marital status, age, occupation, economic health, and wealth level. Thomas Robins sued Spokeo for willful violations of the Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681 *et seq.*, related to its website. Although he asserted that Spokeo's website contained false information about him, Robins's allegations of injury were sparse. Spokeo moved to dismiss Robins's original complaint for lack of subject-matter jurisdiction on the ground that Robins lacked standing sufficient under Article III of the United States Constitution.

On January 27, 2011, the district court ruled that Robins had failed to allege an injury in fact because he had not alleged "any actual or imminent harm." The court characterized Robins's allegations as simply "that he has been unsuccessful in seeking employment, and that he is concerned that the inaccuracies in his report will affect his ability to obtain credit, employment, insurance, and the like." The district court noted that "[a]llegations of possible future injury do not satisfy the [standing] requirements of Art. III" and dismissed the complaint without prejudice.

Robins thereafter filed his First Amended Complaint (FAC). Similar to the original complaint, the FAC alleged willful violations of the FCRA. For example, the website allegedly described Robins as holding a graduate degree and as wealthy, both of which are alleged to be untrue. Robins, who is unemployed, described the misinformation as "caus[ing] actual harm to [his] employment prospects." Remaining unemployed has cost Robins money as well as caused "anxiety, stress, concern, and/or worry about his diminished employment prospects."

Again, Spokeo moved to dismiss for lack of subject-matter jurisdiction on the ground that Robins lacked standing under Article III. On May 11, the district court denied the motion and concluded that Robins had alleged a sufficient injury in fact, namely Spokeo's "marketing of inaccurate consumer reporting information about" Robins. The court also ruled that the injury was traceable to Spokeo's alleged violations of the FCRA and that the injury was redressable through a favorable court decision.

On September 19, after Spokeo moved to certify an interlocutory appeal, the district court reconsidered its previous ruling on standing. It then ruled, contrary to its May 11 order, that Robins failed to plead an injury in fact and that any injuries pled were not traceable to Spokeo's alleged violations, dismissing the action. Robins timely appealed.

II

On appeal, Robins first argues that the law-of-the-case doctrine prohibited the district court from revisiting its own May 11 decision. In *United States v. Smith*, however, we held that the law-of-the-case doctrine does not apply "to circumstances where a district court seeks to reconsider an order over which it has not been divested of jurisdiction." 389 F.3d 944, 949 (9th Cir.2004) (per curiam) (describing the doctrine as "wholly inapposite"). In this case, the district court was not divested of jurisdiction prior to its September 19 order.

Although *United States v. Alexander* held that the law-of-the-case doctrine precluded a district court from reconsidering an evidentiary issue after a mistrial, 106 F.3d 874, 876–77 (9th Cir.1997), we distinguished *Alexander* in *Smith* and do so again here.

The rule from *Alexander* applies only to cases in which a submission to the jury separates the two decisions. *See Smith*, 389 F.3d at 949–50 (distinguishing *Alexander* on the ground that the district court in that case had reconsidered its decision only after submitting the case to a jury).

Here, because the district court had neither been divested of jurisdiction nor submitted this case to the jury, it was free to reconsider its own prior ruling. The law-of-the-case doctrine did not limit the district court.

III

Robins next argues that the FAC sufficiently alleges Article III standing and that the May 11 ruling was correct.[1] The FAC indeed alleges violations of various statutory provisions. *See* 15 U.S.C. § 1681b(b)(1) (listing the circumstances in which consumer reporting agencies (CRAs) may provide "consumer reports for employment purposes"); *id.* § 1681 e(b) (requiring CRAs to "follow reasonable procedures to assure maximum possible accuracy of" consumer reports); *id.* § 1681e(d) (requiring CRAs to issue notices to providers and users of information); *id.* § 1681j(a)

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[1] Spokeo briefly responds that the FAC "pleads no facts from which an inference of willfulness might be drawn." We disagree. "[W]illful [ ]" violations within the meaning of 15 U.S.C. § 1681n include violations in "reckless disregard of statutory duty." *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 57, 127 S.Ct. 2201, 167 L.Ed.2d 1045 (2007). The facts that Robins pled make it plausible that Spokeo acted in reckless disregard of duties created by the FCRA. Robins pled, among other things, that Spokeo knew about inaccuracies in its reports and marketed its reports for purposes covered by the FCRA despite disclaiming any such uses.

(requiring CRAs to post toll-free telephone numbers to allow consumers to request consumer reports). Robins contends that because these provisions are enforceable through a private cause of action, *see id.* § 1681n, they create statutory rights that he has standing to vindicate in court. *See Warth v. Seldin*, 422 U.S. 490, 500, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975) ("The actual or threatened injury required by Art[icle] III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing." (internal quotation marks omitted)).

The district court properly recognized that it would not have subject-matter jurisdiction if Robins did not have standing. *See DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341–42, 126 S.Ct. 1854, 164 L.Ed.2d 589 (2006). The district court also correctly identified the three components of standing: (1) the plaintiff "has suffered an 'injury in fact' that is (a) concrete and partlarized and (b) actual or imminent, not conjectural or hypothetical"; (2) "the injury is fairly traceable to the challenged action of the defendant"; and (3) "it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 180–81, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000). Although more may be required at later stages of the litigation, on a motion to dismiss, "general factual allegations of injury resulting from the defendant's conduct may suffice." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992).

A

In standing cases that analyze statutory rights, our

precedent establishes two propositions. First, Congress's creation of a private cause of action to enforce a statutory provision implies that Congress intended the enforceable provision to create a statutory right. *See Fulfillment Servs. Inc. v. United Parcel Serv., Inc.*, 528 F.3d 614, 619 (9th Cir.2008). Second, the violation of a statutory right is usually a sufficient injury in fact to confer standing. *See Edwards v. First Am. Corp.*, 610 F.3d 514, 517 (9th Cir.2010) ("Essentially, the standing question in such cases is whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief."); *Fulfillment Servs.*, 528 F.3d at 619 (same).

Spokeo contends, however, that Robins cannot sue under the FCRA without showing actual harm. But the statutory cause of action does not require a showing of actual harm when a plaintiff sues for willful violations. 15 U.S.C. § 1681n(a) ("Any person who willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to ... damages of not less than $100 and not more than $1,000...."); *see also Beaudry v. TeleCheck Servs., Inc.*, 579 F.3d 702, 705–07 (6th Cir.2009) (ruling that the FCRA "permits a recovery when there are no identifiable or measurable actual damages"); *Murray v. GMAC Mortg. Corp.*, 434 F.3d 948, 952–53 (7th Cir.2006) (ruling that the FCRA "provide[s] for modest damages without proof of injury").[2]

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[2] Spokeo urges that such interpretation of the FCRA "would raise serious constitutional issues," suggesting that we should adopt the contrary reading, which the Eighth Circuit has de-

The scope of the cause of action determines the scope of the implied statutory right. *See Edwards*, 610 F.3d at 517 ("Because the statutory text does not limit liability to instances in which a plaintiff is overcharged, we hold that Plaintiff has established an injury sufficient to satisfy Article III."). When, as here, the statutory cause of action does not require proof of actual damages, a plaintiff can suffer a violation of the statutory right without suffering actual damages.

B

Of course, the Constitution limits the power of Congress to confer standing. *See Lujan*, 504 U.S. at 577, 112 S.Ct. 2130 (refusing "[t]o permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an 'individual right' vindicable in the courts"); *id.* at 580, 112 S.Ct. 2130 (Kennedy, J., concurring in part and concurring in the judgment) ("The Court's holding that there is an outer limit to the power of Congress to confer rights of action is a direct and necessary consequence of the case and controversy limitations found in Article III."). This constitutional limit, however, does not prohibit Congress from "elevating to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in

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scribed as "reasonable." *See Dowell v. Wells Fargo Bank, NA*, 517 F.3d 1024, 1026 (8th Cir.2008) (per curiam) (noting that one "reasonable reading of the [FCRA] could still require proof of actual damages but simply substitute statutory rather than actual damages for the purpose of calculating the damage award"). We are not persuaded. As we explain below, our reading of the FCRA does not raise difficult constitutional questions. That our sister circuit has described Spokeo's reading as "reasonable," without actually ruling on the best interpretation of the statutory text, is of little consequence here

law." *Id.* at 578, 112 S.Ct. 2130 (majority opinion).

The issue before us is whether violations of statutory rights created by the FCRA are "concrete, *de facto* injuries" that Congress can so elevate. We are not the first Court of Appeals to face this question. In *Beaudry,* the Sixth Circuit considered whether an FCRA plaintiff suing under 15 U.S.C. § 1681n had sufficiently alleged an injury in fact by alleging a violation of the FCRA. 579 F.3d at 707. The court identified two constitutional limitations on congressional power to confer standing. First, a plaintiff "must be 'among the injured,' in the sense that she alleges the defendants violated *her* statutory rights." *Id.* Second, the statutory right at issue must protect against "individual, rather than collective, harm." *Id.* The *Beaudry* court held that the plaintiff satisfied both of these requirements. *Id.*

Robins is in the same position. First, he alleges that Spokeo violated *his* statutory rights, not just the statutory rights of other people, so he is "among the injured." Second, the interests protected by the statutory rights at issue are sufficiently concrete and particularized that Congress can elevate them. *Lujan,* 504 U.S. at 578, 112 S.Ct. 2130. Like "an individual's personal interest in living in a racially integrated community" or "a company's interest in marketing its product free from competition," Robins's personal interests in the handling of his credit information are individualized rather than collective. *Id.* (describing two "concrete, *de facto* injuries" that Congress could "elevat[e] to the status of legally cognizable injuries"). Therefore, alleged violations of Robins's statutory rights are sufficient to satisfy the injury-in-fact requirement of Article III.

C

In addition to injury in fact, of course, standing requires causation and redressability. *See Laidlaw*, 528 U.S. at 180–81, 120 S.Ct. 693. Where statutory rights are asserted, however, our cases have described the standing inquiry as boiling down to "essentially" the injury-in-fact prong. *See Edwards*, 610 F.3d at 517; *Fulfillment Servs.*, 528 F.3d at 618–19. When the injury in fact is the violation of a statutory right that we inferred from the existence of a private cause of action, causation and redressability will usually be satisfied. First, there is little doubt that a defendant's alleged violation of a statutory provision "caused" the violation of a right created by that provision. Second, statutes like the FCRA frequently provide for monetary damages, which redress the violation of statutory rights. *See Jewel v. Nat'l Sec. Agency*, 673 F.3d 902, 912 (9th Cir.2011) (ruling that there was "no real question about redressability" when a plaintiff sought "an injunction and damages, either of which is an available remedy"). Therefore, Robins has adequately pled causation and redressability in this case.[3]

IV

For the foregoing reasons, Robins adequately alleges Article III standing.[4]

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[3] Because we determine that Robins has standing by virtue of the alleged violations of his statutory rights, we do not decide whether harm to his employment prospects or related anxiety could be sufficient injuries in fact.

[4] Because standing is the only question before us, we do not intimate any opinion on the merits of this case. We do not decide,

REVERSED AND REMANDED.

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for example, whether Spokeo qualifies as a consumer reporting agency or whether Spokeo actually violated the FCRA

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA.
CIVIL MINUTES - GENERAL

Case No. CV10-05306 ODW (AGRx)

Date January 27, 2011

Title *Thomas Robins v. Spokeo, Inc.*

Present: The Honorable Otis D. Wright, II, United States District Judge

Raymond Neal	Not Present	n/a
Deputy Clerk	Court Reporter	Tape No.

Attorneys Present for Plaintiff(s):

Not Present

Attorneys Present for Defendant(s):

Not Present

Proceedings (In Chambers): Order GRANTING Defendant's Motion to Dismiss Plaintiffs' Complaint [22] (Filed 11/03/10)

I. INTRODUCTION

Currently before this Court is Defendant, Spokeo, Inc.'s ("Defendant"), Motion to Dismiss Plaintiff Thomas Robin's ("Plaintiff") Complaint pursuant to Fed.R.Civ.P. 12(b)(6). (Dkt.# 22.) On January 10, 2011, Plaintiff filed an Opposition (Dkt.# 30), to which Defendant responded on January 20, 2011 (Dkt. # 31). Having carefully considered the papers filed in support of and in opposition to the instant

Motion, the Court deems the matter appropriate for decision without oral argument. *See* Fed.R.Civ.P. 78; L.R. 7–15. For the following reasons, Defendant's Motion is **GRANTED.**

II. FACTUAL BACKGROUND

Plaintiff alleges that Defendant operates its website, Spokeo.com, in violation of the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681.[5] (Compl.¶¶ 1, 2.) Specifically, Plaintiff claims that reports generated by Spokeo.com contain inaccurate consumer information that is marketed to entities performing background checks. (Compl. ¶¶ 13, 17.) As a result of Defendant's FCRA violations, Plaintiff is concerned that his ability to obtain credit, employment, insurance and the like will be adversely affected. (Compl. ¶¶ 23, 24.)

In response, Defendant argues that it is not a consumer reporting agency under the FCRA, and thereby cannot be sued for alleged FCRA violations. (Mot. at 8.) Moreover, Defendant argues that even if it could be sued under the FCRA, Plaintiff does not have standing to bring such a claim. (Mot. at 17.) Defendant now brings the instant Motion to Dismiss the Complaint in its entirety for failure to state a claim upon which relief can be granted, Fed.R.Civ.P. 12(b)(6), and lack of subject matter jurisdiction because Plaintiff lacks standing, Fed.R.Civ.P. 12(b)(1).

III. DISCUSSION

In order for this Court to have subject matter juris-

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[5] Plaintiff's causes of action are for: violations of the Fair Credit Reporting Act, 15 U.S.C. §§ 1681(b); 1681(e); 1681(j); and violation of Cal. Bus. & Prof.Code § 17200, *et seq.*

diction over the merits of Plaintiff's claims, Plaintiff must have established the requisite standing to sue. *See Whitmore v. Arkansas,* 495 U.S. 149, 154, 110 S.Ct. 1717, 109 L.Ed.2d 135 (1990). Thus, as an initial matter, this Court will address Defendant's argument that Plaintiff does not have standing.

A plaintiff has standing where (1) the plaintiff has suffered an injury in fact; (2) there is a causal connection between the injury and the conduct complained of; and (3) it is likely that the injury will be redressed by a favorable decision. *See Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560–61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). In the instant matter, Defendant contends that Plaintiff does not have standing because he has not alleged that he has in fact suffered any injury due to Spokeo's alleged conduct. (Mot. at 18.) The Court agrees.

Plaintiff argues that he has met the requirements of standing simply by alleging that Defendant is in violation of a statute that grants individuals a private right of action. (Opp. at 14.) However, even when asserting a statutory violation, the plaintiff must allege "the Article III minima of injury-in-fact." *Gomez v. Alexian Bros. Hosp. of San Jose,* 698 F.2d 1019, 1020–21 (9th Cir.1983). An "injury in fact," for the purposes of standing, must be actual or imminent and not conjectural or hypothetical. *Whitmore v. Arkansas,* 495 U.S. 149, 155, 110 S.Ct. 1717, 109 L.Ed.2d 135 (1990) (quoting *Los Angeles v. Lyons,* 461 U.S. 95, 102, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983)). At this point, Plaintiff has not suffered an injury in fact because Plaintiff has failed to allege that Defendant has caused him any actual or imminent harm. Plaintiff only expresses that he has been un-

successful in seeking employment, and that he is "concerned that the inaccuracies [in] his report *will affect* his ability to obtain credit, employment, insurance, and the like." (Compl. ¶¶ 23, 24) (emphasis added.) The Supreme Court has "said many times before" that [a]llegations of possible future injury do not satisfy the [standing] requirements of Art. III." *Whitmore,* 495 U.S. at 158. Thus, Plaintiff's concern that he *will be* adversely affected by Defendant's website in the future, is an insufficient injury to confer standing.

Because Plaintiff does not have standing to bring his claims before this Court, no subject matter jurisdiction exists and, at this time, the Court will not address the merits of Plaintiff's claims. *See id.* at 154. This case is hereby **DISMISSED WITHOUT PREJUDICE.**

IV. CONCLUSION

For the foregoing reasons, Defendant's Motion to Dismiss is **GRANTED.** Plaintiff shall have twenty (20) days from the date of this Order to amend his Complaint to meet the standing requirements. If Plaintiff fails to do so, all claims will be dismissed with prejudice.

IT IS SO ORDERED.

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA.
CIVIL MINUTES - GENERAL

Case No. CV10-05306 ODW (AGRx)

Date May 11, 2011

Title *Thomas Robins v. Spokeo, Inc.*

Present: The Honorable Otis D. Wright, II, United States District Judge

Raymond Neal	Not Present	n/a
Deputy Clerk	Court Reporter	Tape No.

Attorneys Present for Plaintiff(s):

Not Present

Attorneys Present for Defendant(s):

Not Present

Proceedings (In Chambers): Order GRANTING in part and DENYING in part Defendant's Motion to Dismiss Plaintiffs' First Amended Complaint [42]

I. INTRODUCTION

Currently before this Court is Defendant, Spokeo, Inc.'s ("Defendant"), Motion to Dismiss Plaintiff, Thomas Robin's ("Plaintiff"), First Amended Complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). (Dkt. # 45.) Having carefully considered the papers filed in support of and in opposition to the instant Motion, the Court deems the

matter appropriate for decision without oral argument. *See* Fed.R.Civ.P. 78; L.R. 7–15. For the following reasons, Defendant's Motion is **GRANTED in part** and **DENIED in part.**

II. FACTUAL BACKGROUND

On January 27, 2011, this Court dismissed Plaintiff's Complaint for lack of standing and gave Plaintiff twenty days to amend his Complaint to meet the standing requirements.[6] (Dkt.# 35.) On February 16, 2011, Plaintiff filed a First Amended Complaint ("FAC"). (Dkt.# 36.) In his FAC, Plaintiff alleges that Defendant operates its website, Spokeo.com, in violation of the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681.[7] (FAC ¶¶ 1, 2.) Specifically, Plaintiff claims that reports generated by Spokeo.com contain inaccurate consumer information that is marketed to entities performing background checks, including "HR professionals and potential employers[.]" (FAC ¶¶ 13–15, 22, 29 .) As a result of Defendant's FCRA violations, Plaintiff alleges that Defendant has caused him "actual and/or imminent harm by creating, displaying, and marketing inaccurate consumer reporting information about Plaintiff." (FAC ¶ 35.)

In response, Defendant avers that it cannot be sued for alleged FCRA violations because it is not a consumer reporting agency. (Memorandum in Support of Motion ("Memo"), Dkt. # 46, at 2.) Defendant now brings the instant Motion to Dismiss Plaintiff's FAC

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[6] Specifically, Plaintiff's Complaint was dismissed on the basis that he did not sufficiently allege an injury in fact to confer Article III standing.

[7] Plaintiff's causes of action are for: violations of the Fair Credit Reporting Act, 15 U.S.C. §§ 1681(b); 1681(e); 1681(j); and violation of Cal. Bus. & Prof.Code § 17200, *et seq.*

in its entirety for failure to state a claim upon which relief can be granted, Federal Rule of Civil Procedure 12(b)(6), and lack of subject matter jurisdiction, Federal Rule of Civil Procedure 12(b) (1).

III. LEGAL STANDARD

A. Subject Matter Jurisdiction

In order for this Court to have subject matter jurisdiction over the merits of Plaintiff's claims, Plaintiff must establish the requisite standing to sue. *See Whitmore v. Arkansas,* 495 U.S. 149, 154, 110 S.Ct. 1717, 109 L.Ed.2d 135 (1990). A plaintiff has Article III standing to sue where the plaintiff alleges facts showing that "(1) it has suffered an 'injury in fact' ... (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely ... that the injury will be redressed by a favorable decision." *Friends of the Earth v. Laidlaw Envtl. Servs. (TOC), Inc.,* 528 U.S. 167, 180–81, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000). "The litigant must clearly and specifically set forth facts to satisfy these Art. III standing requirements." *Whitmore,* 495 U.S. at 155–56.

B. Failure to State a Claim

When considering a Rule 12(b)(6) motion to dismiss for failure to state a claim, a court must construe "[a]ll factual allegations set forth in the complaint ... as true and ... in the light most favorable to [the plaintiff]." *See Lee v. City of L.A.,* 250 F.3d 668, 688 (9th Cir.2001) (citing *Epstein v. Washington Energy Co.,* 83 F.3d 1136, 1140 (9th Cir.1996)). "To survive a [12(b)(6)] motion to dismiss ... a complaint generally must satisfy only the minimal notice pleading requirements of Rule 8(a) (2)." *Porter v. Jones,* 319 F.3d

483, 494 (9th Cir.2003). Rule 8(a)(2) requires "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed.R.Civ.P. 8(a)(2). For a complaint to sufficiently state a claim, its "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). Mere "labels and conclusions" or a "formulaic recitation of the elements of a cause of action will not do." *Id.* Rather, to overcome a 12(b)(6) motion, "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal,* —— U.S. ——, ——, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009) (internal quotation marks omitted).

IV. DISCUSSION

As an initial matter, Defendant moves to dismiss Plaintiff's FAC pursuant to Federal Rule of Civil Procedure 12(b)(1) asserting that this Court does not have subject matter jurisdiction to consider Plaintiff's claims. (Memo at 1.) The Court disagrees. In light of Plaintiff's FAC, the Court finds that Plaintiff has alleged sufficient facts to confer Article III standing. Specifically, Plaintiff has alleged an injury in fact—the "marketing of inaccurate consumer reporting information about Plaintiff"—that is fairly traceable to Defendant's conduct—alleged FCRA violations-and that is likely to be redressed by a favorable decision from this Court. (FAC ¶¶ 1, 35, 65) *See Friends of the Earth,* 528 U.S. at 180–81. Accordingly, Plaintiff has established the requisite standing to sue and the Court has subject matter jurisdiction over Plaintiff's claims.

Alternatively, Defendant moves to dismiss Plaintiff's

FAC pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim, asserting that: (1) Defendant is not a consumer reporting agency under the FCRA, (2) Defendant "is immune from the alleged liability under the Communications Decency Act ("CDA") [,]" and (3) "Plaintiff's claim under California's Unfair Competition Law, Cal. Bus. & Prof.Code § 17200 *et seq.* ("UCL") fails both because it depends entirely on the failed FCRA claims and because Plaintiff does not and cannot allege that he lost money or property because of [Defendant's] alleged conduct[.]" (Memo at 2.) The Court considers each argument below.

A. Defendant's argument that it is not a consumer reporting agency

Under the FCRA, a consumer reporting agency is:

> any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports.

15 U.S.C. § 1681a(f). Defendant avers that Plaintiff fails to state a claim against it under the FCRA because Defendant is not a "consumer reporting agency." (Memo at 12.) Specifically, Defendant contends that it does not regularly engage in providing con-

sumer credit information for the purpose of furnishing consumer reports. (*Id.*) Conversely, Plaintiff alleges that "Defendant falls within the scope of FCRA because [Defendant] ... collects and creates [consumer] information for the purpose of furnishing it to paid subscribers who regularly provide monetary fees in exchange for Spokeo's reports, which contain data and evaluations regarding consumers' economic wealth and creditworthiness." (Opp. at 14; FAC ¶¶ 18–19, 26, 29.)

To overcome a 12(b)(6) motion to dismiss, a complaint must only "contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Iqbal*, 129 S.Ct. at 1949. Accordingly, Plaintiff need not at this stage prove that Defendant is in fact a "consumer reporting agency." Plaintiff's allegations that Defendant regularly accepts money in exchange for reports that "contain data and evaluations regarding consumers' economic wealth and creditworthiness" (FAC ¶¶ 18–19, 26, 29) are sufficient to support a plausible inference that Defendant's conduct falls within the scope of the FCRA.[8] Thus, Plaintiff has alleged sufficient facts to

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[8] Defendant further contends that its reports cannot constitute "consumer reports" because the FCRA requires that such reports are "used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for[any unauthorized FCRA purpose,]" 15 U.S.C. § 1681a(d)(1), and disclaimers on Defendant's website specifically provide that the information "cannot be used for FCRA purposes." (Memo at 13–15.) The Court, however, finds that this argument fails for the same reasons as the previous argument. Plaintiff's allegations that Defendant expects its reports to be used for unauthorized FCRA purposes because Defendant's reports contain information traditionally associated

survive Defendant's Motion on this ground.

B. Defendant's argument that it is immune under the CDA

The CDA states that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c). This provision "immunizes providers of interactive computer services against liability for content created by third parties[.]" *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1162 (9th Cir.2008). Defendant asserts that it is immune under the CDA because it is an "interactive computer service" that "passively displays content that is created entirely by third parties." (Memo at 19.) Plaintiff, however, alleges that CDA immunity does not apply to Defendant because unlike information content providers that simply reorganize information obtained from other content providers, "Defendant develops original content based on information obtained from a variety of sources and posts it online[.]" (Opp. at 21; FAC ¶¶ 12–13.) Accordingly, application of the immunity is not clear at this time and the Court declines to dismiss the Complaint on this basis.

C. Plaintiff's UCL Claim

California's UCL defines unfair competition as "any unlawful, unfair or fraudulent business act or prac-

---

with "consumer reports" and Defendant markets such reports to "HR professionals and potential employers" (Opp. at 16–17; FAC ¶ ¶ 26–29) are sufficient to support a plausible inference that Defendant's reports are "consumer reports" within the scope of the FCRA

tice[.]" Cal. Bus. & Prof.Code § 17200. The UCL grants a private right of action to any "person who has suffered injury in fact and has lost money or property as a result of the unfair competition." Cal. Bus. & Prof.Code § 17204. Defendant avers that Plaintiff does not have standing under the UCL because "he does not plead any factual basis for [the] conclusion" that he has "lost money" as a result of Defendant's conduct. (Memo at 22.) Plaintiff, however, alleges that Defendant's conduct has caused actual harm to [his] employment prospects." (FAC ¶ 35.) As a result, Plaintiff contends that he has "suffered economic injury in the form of lost income during his period of unemployment." (Opp. at 23; FAC ¶ 36.) The Court agrees with Defendant.

Plaintiff's conclusory allegations that Defendant's conduct has harmed his employment prospects are insufficient. While, at this stage the Court is required to accept allegations contained in the Complaint as true, mere labels and conclusions will not do. *See Lee v. City of L.A.*, 250 F.3d at 688; *Twombly*, 550 U.S. at 555. Accordingly, Plaintiff has not provided sufficient facts to "raise a right to relief above the speculative level," *See Twombly*, at 555, and Plaintiff's UCL claim is hereby **DISMISSED WITH PREJUDICE.**

V. CONCLUSION

For the foregoing reasons, Defendant's Motion to Dismiss is **GRANTED in part** and **DENIED in part.** Defendant's Motion is GRANTED with respect to Plaintiff's UCL claim and DENIED as to Plaintiff's claims arising under the FCRA.

IT IS SO ORDERED.

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA.
CIVIL MINUTES - GENERAL

Case No. CV10-05306 ODW (AGRx)

Date September 19, 2011

Title *Thomas Robins v. Spokeo, Inc.*

Present: The Honorable Otis D. Wright, II, United States District Judge

Sheila English	Not Present	n/a
Deputy Clerk	Court Reporter	Tape No.

Attorneys Present for Plaintiff(s):

Not Present

Attorneys Present for Defendant(s):

Not Present

Proceedings (In Chambers): Order Correcting Prior Ruling [52] and Finding Moot Motion for Certification. [57]

Upon further review, the Court finds it necessary to strike the standing discussion from its May 11, 2011 Order. (Docket No. 52.) In its stead, the Court reinstates the January 27, 2011 Order, which found that Plaintiff fails to establish standing. (*See* Docket No. 35.) Among other things, the alleged harm to Plaintiff's employment prospects is speculative, attenuated and implausible. Mere violation of the Fair Credit Reporting Act does not confer Article III standing, moreover, where no injury in fact is properly pled.

Otherwise, federal courts will be inundated by web surfers' endless complaints. Plaintiff also fails to allege facts sufficient to trace his alleged harm to Spokeo's alleged violations. In short, Plaintiff fails to establish his standing before this Court. This action is therefore **DISMISSED.** Spokeo's motion for certification of appeal is **MOOT.**

SO ORDERED.

APPENDIX E

Fair Credit Reporting Act,
15 U.S.C. § 1681 *et seq.*

15 U.S.C. § 1681a. Definitions; rules of construction

* * *

(d) CONSUMER REPORT.—

(1) IN GENERAL.—The term "consumer report" means any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for—

(A) credit or insurance to be used primarily for personal, family, or household purposes;

(B) employment purposes; or

(C) any other purpose authorized under section 1681b of this title.

* * *

(f) The term "consumer reporting agency" means any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means

or facility of interstate commerce for the purpose of preparing or furnishing consumer reports.

* * *

15 U.S.C. § 1681e. Compliance procedures

(b) Accuracy of report

Whenever a consumer reporting agency prepares a consumer report it shall follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates.

* * *

(d) Notice to users and furnishers of information

(1) Notice requirement

A consumer reporting agency shall provide to any person—

(A) who regularly and in the ordinary course of business furnishes information to the agency with respect to any consumer; or

(B) to whom a consumer report is provided by the agency; a notice of such person's responsibilities under this subchapter.

** *

15 U.S.C. § 1681n. Civil liability for willful non compliance

(a) In general

Any person who willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of—

(1)(A) any actual damages sustained by the consumer as a result of the failure or damages of not less than $100 and not more than $1,000; or

(B) in the case of liability of a natural person for obtaining a consumer report under false pretenses or knowingly without a permissible purpose, actual damages sustained by the consumer as a result of the failure or $1,000, whichever is greater;

(2) such amount of punitive damages as the court may allow; and

(3) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

(b) Civil liability for knowing noncompliance

Any person who obtains a consumer report from a consumer reporting agency under false pretenses or knowingly without a permissible purpose shall be liable to the consumer reporting agency for actual damages sustained by the consumer reporting agency or $1,000, whichever is greater.

(c) Attorney's fees

Upon a finding by the court that an unsuccessful pleading, motion, or other paper filed in connection with an action under this section was filed in bad faith or for purposes of harassment, the court shall award to the prevailing party attorney's fees reasonable in relation to the work expended in responding to the pleading, motion, or other paper.

(d) Clarification of willful noncompliance

For the purposes of this section, any person who

printed an expiration date on any receipt provided to a consumer cardholder at a point of sale or transaction between December 4, 2004, and June 3, 2008, but otherwise complied with the requirements of section 1681c(g) of this title for such receipt shall not be in willful noncompliance with section 1681c(g) of this title by reason of printing such expiration date on the receipt.

15 U.S.C. § 1681o. Civil liability for negligent noncompliance

(a) In general

Any person who is negligent in failing to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of—

(1) any actual damages sustained by the consumer as a result of the failure; and

(2) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

(b) Attorney's fees

On a finding by the court that an unsuccessful pleading, motion, or other paper filed in connection with an action under this section was filed in bad faith or for purposes of harassment, the court shall award to the prevailing party attorney's fees reasonable in relation to the work expended in responding to the pleading, motion, or other paper.

OPPOSITION BRIEF

Supreme Court, U.S.
FILED
AUG 6 - 2014
OFFICE OF THE CLERK

No. 13-1339

IN THE

Supreme Court of the United States

SPOKEO, INC.,

Petitioner,

v.

THOMAS ROBINS, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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TABLE OF CONTENTS

Table of authorities ii

Introduction 1

Statement 2

Reasons for denying the petition 4

I. Because this case involves allegations of concrete and particularized injuries, it does not present Spokeo's question. 4

II. There is no circuit split 10

III. Robins has Article III standing. 12

IV. Spokeo and its amici have greatly exaggerated the implications of this case 15

Conclusion 19

TABLE OF AUTHORITIES

Cases

ASARCO Inc. v. Kadish,
490 U.S. 605 (1989) 17

Beaudry v. TeleCheck Servs., Inc.,
579 F.3d 702 (6th Cir. 2009) 12

Carey v. Piphus,
435 U.S. 247 (1978) 14

Charvat v. Mutual First Federal Credit Union,
725 F.3d 819 (8th Cir. 2013) 7

Clapper v. Amnesty International USA,
133 S. Ct. 1138 (2013) 9

David v. Alphin,
704 F.3d 327 (4th Cir. 2013) 10, 11

Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985) 6

Edwards v. First American Financial Corp.,
610 F.3d 514 (9th Cir. 2010) 8, 12

F.W. Woolworth Co. v. Contemporary Arts, Inc.,
344 U.S. 228 (1952) 14

Federal Election Commission v. Akins,
524 U.S. 11 (1998) 9

Feltner v. Columbia Pictures Television, Inc.,
523 U.S. 340 (1998) 14

First American Financial Corp. v. Edwards,
132 S. Ct. 2536 (2012) 1, 7, 8, 16

First National Bank of Wahoo v. Charvat,
134 S.Ct. 1515 (2014) 1, 7, 8, 15

Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.,
528 U.S. 167 (2000) 8

Hammer v. Sam's E., Inc.,
2014 WL 2524534 (8th Cir. 2014) 12

Hardin v. Kentucky Utilities Co.,
390 U.S. 1 (1968) 13

Kendall v. Employees Retirement Plan of Avon Prods., 561 F.3d 112 (2d Cir. 2009) 10, 11

Lebron v. National R.R. Passenger Corp.,
513 U.S. 374 (1995) 9

Linda R.S. v. Richard D.,
410 U.S. 614 (1973) 13

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992) ..... *passim*

Massachusetts v. E.P.A.,
549 U.S. 497 (2007) 13

Meese v. Keene,
481 U.S. 465, 475 (1987) 5

Murray v. GMAC Mortgage Corp.,
434 F.3d 948 (7th Cir. 2006) 12

National Consumers League v. General Mills, Inc., 680 F. Supp. 2d 132 (D.D.C. 2010) 17

Ohio v. Robinette,
519 U.S. 33 (1996) 10, 18

Paul v. Davis,
424 U.S. 693 (1976) 7

Pollard v. Lyon,
91 U.S. 225 (1876) 14

Public Citizen v. U.S. Department of Justice,
491 U.S. 440 (1989) 10

Robey v. Shapiro, Marianos & Cejda, L.L.C.,
434 F.3d 1208 (10th Cir. 2006) 12

Robins v. Spokeo,
2012 WL 4665532 10

Shaw v. Marriott International, Inc.,
605 F.3d 1039 (D.C. Cir. 2010) 12

Sierra Club v. Morton,
405 U.S. 727 (1972) 5

Simon v. Easter Kentucky Welfare Rights Organization, 426 U.S. 26 (1976) 15, 17

Steel Co. v. Citizens for a Better Environment,
523 U.S. 83 (1998) 5

Susan B. Anthony List v. Driehaus,
134 S. Ct. 2334 (2014) 8

Warth v. Seldin,
422 U.S. 490 (1975) 11, 13

Whittemore v. Cutter,
29 F Cas. 1120 (C.C.D. Mass. 1813) 13, 14

Legislative Materials

115 Cong. Rec. 2411 (1969) 2

141 Cong. Rec. 5419 (1995) 3

Fair Credit Reporting Act

15 U.S.C. § 1681(a). 2

15 U.S.C. § 1681b(b) 9

15 U.S.C. § 1681e 2

15 U.S.C. § 1681e(b) 2

15 U.S.C. § 1681e(d)(1) 10

15 U.S.C. § 1681e(d)(2) 9

15 U.S.C. § 1681j 2

15 U.S.C. § 1681j(a)(1)(C) 9

15 U.S.C. § 1681n 3, 11

15 U.S.C. § 1681n(a) 7

17 U.S.C. § 504(c) 14

29 U.S.C. §1109 11

Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (2005) 17

Alaska Stat. § 21.36.070 6

La. Rev. Stat. Ann. § 6:930 6

Treatises

Dan B. Dobbs et al., *The Law of Torts* (2d ed. 2013) 5

Restatement (Second) of Torts (1977) 5

Articles

Virginia G. Maurer, *Common Law Defamation and the Fair Credit Reporting Act*, 72 Geo. L.J. 95 (1983).....2, 6

Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U. L. Rev. 881 (1983).....13

Cass R. Sunstein, *Informational Regulation and Informational Standing: Akins and Beyond*, 147 U. Penn. L. Rev. 613 (1999).....10

INTRODUCTION

According to the petition, this case raises the question whether Congress can confer Article III standing "in the absence of any allegation of concrete and particularized injury." Pet. 2. But that question is not presented here. Respondent *has* alleged concrete and particularized injuries—economic, reputational, and emotional injuries caused by the publication of false information about him, and no one else. Under the law of defamation, these kinds of allegations have been enough for suits in common-law courts since the seventeenth century.

These concrete allegations make this case a far worse vehicle than either *First American Financial Corporation v. Edwards*, No. 10-708, or *First National Bank of Wahoo v. Charvat*, No. 13-679—both of which claimed to raise the same question. Petitioner never denies that respondent alleges these injuries, but relegates them to a two-paragraph argument on an entirely different element of standing: causation. Pet. 24. That the Court would have to confront petitioner's factbound, case-specific causation argument before even reaching the petition's question belies the assertion that this case "cleanly presents" that question. Pet. 23.

Instead of addressing the allegations, petitioner and its amici raise hypothetical class-action horror stories—some copied nearly verbatim from the briefs in *Charvat*. But their concerns are exaggerated: Damages for the invasion of legal rights have long been a mainstay of our legal system, for everything from contract to copyright. Using Article III to bar these claims, by contrast, would have significant consequences—including a shift of many class actions to state courts, in tension with recent congressional policy. Petitioner and its amici have invited this Court to take this bad vehicle to hear an unnecessary question. The Court should decline.

STATEMENT

1. Before 1970, if a consumer was injured by the dissemination of false credit information, actions for redress "could be brought only under state defamation law." Virginia G. Maurer, *Common Law Defamation and the Fair Credit Reporting Act*, 72 Geo. L.J. 95, 98 (1983). In that year, Congress responded to the "need to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy" by enacting the Fair Credit Reporting Act. 15 U.S.C. § 1681(a). Senator Proxmire, the bill's lead sponsor, noted that among the issues the FCRA was designed to combat "[p]erhaps the most serious problem in the credit reporting industry is the problem of inaccurate or misleading information." 115 Cong. Rec. 2411 (1969).

The FCRA, "to a great extent, incorporated common law defamation principles" into a federal cause of action that consumers can bring against agencies who, among other things, publish false information about them as a result of careless procedures. Maurer, *supra*, at 126; 15 U.S.C. § 1681e(b). To protect consumers, Congress specified several procedures that credit reporting agencies must follow—such as providing the furnishers and users of consumer information with notices of their legal obligations and publicizing a telephone number through which consumers can access free reports. 15 U.S.C. § 1681e; *id.* § 1681j. In addition to these specific provisions, the FCRA requires credit reporting agencies to "follow reasonable procedures to assure maximum possible accuracy" of their information. 15 U.S.C. § 1681e(b). In 1996, responding to "horror stories about inaccurate credit information and the inability of consumers to get the information corrected," 141 Cong. Rec. 5419 (1995),

Congress amended the FCRA to include a damages provision granting "not less than $100 and not more than $1,000" to consumers who are the victims of willful violations of the Act. 15 U.S.C. § 1681n.

2. Petitioner Spokeo, Inc. publishes reports on individual consumers' economic health, occupation, wealth, and more. Am. Compl. ¶ 2. Spokeo has published and maintains a report on respondent Thomas Robins that contains a significant amount of inaccurate information. *Id.* at ¶¶ 30-32. Spokeo's report initially misrepresented Robins's age, wealth, employment status, and education level, in addition to incorrectly stating that Robins is married and has children. *Id.* Although some of the report's false material has been modified, Spokeo continues to misrepresent Robins's education, wealth, and economic health. *Id.* Spokeo has marketed its reports to businesses and human resource professionals as a way to research potential new hires. *Id.* at ¶ 15, ¶ 28. Robins is currently unemployed and seeking work. *Id.* at ¶ 34.

3. Robins sued Spokeo in federal court, alleging that false information published by Spokeo has injured his employment prospects, causing him both financial and emotional harm. *Id.* at ¶¶ 35-37. In addition, Robins alleges that Spokeo has violated five different FCRA requirements by not making required disclosures and not following procedures that are designed to ensure the accuracy of its information. *Id.* at ¶¶ 61-74. Robins seeks statutory damages under 15 U.S.C. § 1681n. Am. Compl. 16 ¶ C.

After the district court initially dismissed Robins's complaint without prejudice, Pet. App. 14a, Robins developed his complaint to include descriptions of how Spokeo has marketed its information to employers. *See* Am. Compl. The district court then found that Robins

had alleged an injury sufficient to confer Article III standing: Spokeo's marketing of inaccurate information about him, which was "fairly traceable" to Spokeo's conduct and "likely to be redressed by a favorable decision from this court." Pet. App. 18a. Spokeo objected to this decision, and the district court reversed itself—dismissing the case for lack of standing in a single-paragraph opinion four months later. *Id.* at 23a.

In a unanimous opinion authored by Judge O'Scannlain, the court of appeals rejected Spokeo's argument that Robins had not sufficiently alleged willful violations of the FCRA. Instead, the court found that "[t]he facts that Robins pled make it plausible that Spokeo acted in reckless disregard of [its] statutory duty" to ensure the accuracy of the information it published. *Id.* at 4a n.1. The court held that Spokeo's alleged violations of the FCRA were sufficient to confer standing on Robins, *id.* at 8a, and therefore declined to further evaluate the concrete economic, reputational, and emotional injuries that Robins alleged. *Id.* at 9a n.3.

REASONS FOR DENYING THE PETITION

I. Because this case involves allegations of concrete and particularized injuries, it does not present Spokeo's question.

Spokeo asserts that this case raises the question whether there can be "Article III standing in the absence of any allegation of concrete and particularized injury." Pet. 2. But Robins has clearly alleged concrete and particularized injuries: economic harm to his employment prospects, Am. Compl. ¶¶ 35-36; informational injury from Spokeo's failure to provide legally mandated disclosures, *id.* at ¶ 74; and emotional injury, *id.* at ¶ 37. The kinds of injuries Robins alleges are well established. As a result, this case is a poor vehicle for Spokeo's ques-

tion, which by its own terms applies only where a plaintiff "suffers no concrete harm." Pet. i.

A. Allegations of injury based on the publication of false information have a long pedigree in the common law, and would have been familiar to the Framers of Article III. Claimants who allege such injuries have had standing in common-law courts since at least the seventeenth century. Dan B. Dobbs et al., *The Law of Torts* § 517 (2d ed. 2013). Tort law recognizes a variety of ways in which publishing falsehoods or private information creates a cognizable injury. *See, e.g.*, Restatement (Second) of Torts § 559 (1977) (defamatory communications), *id.* § 623A (publication of injurious falsehood), *id.* § 652D (publicizing private life), *id.* § 652E (publicizing someone in a false light). An individual's allegation that he was harmed by published falsehoods—falsehoods that specifically concern him and no one else—is a claim "of the sort traditionally amenable to, and resolved by, the judicial process." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102 (1998). Indeed, this Court has held that even "a risk of injury to [one's] reputation," without more, is a sufficient injury for Article III standing. *Meese v. Keene*, 481 U.S. 465, 475 (1987).

In addition to this reputational harm, Robins also alleges a specific economic injury—the harm to his employment prospects by Spokeo's marketing of false information about him. Am. Compl. ¶¶ 35-36. Such "palpable economic injuries have long been recognized as sufficient to lay the basis for standing, with or without a specific statutory provision for judicial review." *Sierra Club v. Morton*, 405 U.S. 727, 733 (1972). With the FCRA, Congress endorsed claims like Robins's—Spokeo cannot argue that the statute makes him somehow *less* worthy of standing.

The FCRA's cause of action, analogous to common-law claims designed to vindicate reputational injury, does not detract from Robins's standing in any way. Legislatures have long built upon the common-law claim of defamation per se by passing statutes that proscribe particular kinds of behavior. Alaska, for instance, prohibits defamatory statements that are "critical of or derogatory to the financial condition of a person in the insurance business," while Louisiana prohibits defamatory statements that are critical of certain financial institutions. Alaska Stat. § 21.36.070; La. Rev. Stat. Ann. § 6:930. The FCRA is the same type of law passed at the federal level to protect consumers. "[T]he FCRA, to a great extent, incorporated common law defamation principles" when it created a federal cause of action "to redress injuries that prior to the FCRA could be brought only under state defamation law." Maurer, *supra*, at 126, 98. This action is thus a federal statutory analog to traditional state common-law claims that have always been sufficient for standing. Spokeo's question presented applies only to "a plaintiff who suffers no concrete harm," pet. i, but actual injury has been alleged here. This case could be decided on the merits of the statutory questions under the FCRA without ever reaching Spokeo's question—making the question unworthy of this Court's review.

Spokeo is wrong to argue that the FCRA's statutory-damages provision somehow changes the standing inquiry. Statutory-damages under the FCRA reflect a facet of reputational-injury law that this Court has recognized: "the experience and judgment of history that proof of actual damage will be impossible in a great many cases" despite "the character of the defamatory words and the circumstances of publication." *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S.

749, 760 (1985) (internal quotation marks omitted). In light of this reality, the law must specify what is "generally considered defamatory [p]er se, and actionable without proof of special damages." *Paul v. Davis*, 424 U.S. 693, 697 (1976). The FCRA's "clear analogs in our common-law tradition" demonstrate that it does not raise the question whether Congress may create "a case or controversy where none existed before." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 580 (1992) (Kennedy, J., concurring).

B. Robins's concrete, particularized allegations make this case a much worse vehicle for Spokeo's question than the two cases that this Court has already declined to decide. Spokeo's petition is a slightly updated version of the petition in *First Nat. Bank of Wahoo v. Charvat*, No. 13-679. But this Court did not grant certiorari in *Charvat*, and should not do so here. The claim in *Charvat* hinged on allegations that two banks' ATMs did not comply with federal notice requirements. *See Charvat v. Mut. First Fed. Credit Union*, 725 F.3d 819 (8th Cir. 2013). That claim would have given standing to any person who walked off the street to use one of either bank's ATMs, even someone who visited the bank solely for the purpose of obtaining a basis to file a lawsuit. In contrast, Spokeo has posted false information about Robins in particular, and Spokeo is liable only to Robins for this wrong under the FCRA. 15 U.S.C. § 1681n(a). *Charvat* was a bad vehicle; this case is worse.

Spokeo also asserts that this case raises the same issues as *First American Financial Corporation v. Edwards*, 132 S. Ct. 2536 (2012). Pet. 2. But in *First American*, the plaintiff explicitly argued that she need not allege *any* injury beyond the bare statutory violation. *See* Br. for Respondent 35-36, *First American Fin. Corp. v.*

Edwards, No. 10-708. She could not have alleged economic injury from the illegal kickbacks she challenged, because the price of the services she received was set by law. *Edwards v. First American Fin. Corp.*, 610 F.3d 514, 516 (9th Cir. 2010). In contrast, this case involves allegations of concrete, particularized injury—that Spokeo has harmed and continues to harm Robins by publishing false information *about him*. Am. Compl. ¶ 35. This case thus involves alleged injuries that are more concrete than those in *First American* and more particularized than those in *Charvat*, making it a poor vehicle for addressing the question Spokeo claims is presented here.

C. Nevertheless, Spokeo contends that this case "cleanly presents" its question for two reasons. Pet. 23-24. First, Spokeo argues that there is no commercial relationship between it and Robins. *Id.* Second, Spokeo argues that there is a causation problem with the injuries Robins alleges. Neither of these points is persuasive.

First, Spokeo points out that, in contrast to *First American*, Robins has not entered into a commercial transaction with Spokeo. *Id.* But Spokeo does not cite any authority—because none exists—for the notion that a commercial transaction is somehow a prerequisite to an injury-in fact. *See, e.g., Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334 (2014) (finding injury-in-fact in the threatened enforcement of a law); *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167 (2000) (finding injury-in-fact due to damage to aesthetic and recreational interests). A great many cases—including many, if not most, tort cases—unquestionably involve an injury-in-fact in the complete absence of commercial transactions.

Second, unable to deny that Robins has alleged actual injuries, Spokeo instead makes a causation argument based on *Clapper v. Amnesty International USA*, 133 S. Ct. 1138 (2013). Pet. 24. But this is a non sequitur—the question whether Robins has sufficiently pled causation is a completely distinct question from the one Spokeo claims this case "cleanly" presents. Spokeo's question presumes that Robins has "suffer[ed] no concrete harm," Pet. i. But as its *Clapper* argument illustrates, what Spokeo really is arguing is that Robins has insufficiently proved causation. Such a logically "prior question" would necessitate a case-specific, fact-bound inquiry that this Court would have to undertake without the benefit of a clear ruling on the causation issue by the court below. *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 381-82 (1995). There is thus a serious risk that Spokeo's presumption that Robins has not suffered harm will later be proved wrong—"a risk that ought to be avoided." *Id.* at 382.

D. Finally, Spokeo completely ignores several of Robins's allegations that also could serve as grounds for standing. In addition to alleging that Spokeo violated the FCRA by failing to adopt procedures that prevented the publication of false information, Robins also alleges that Spokeo violated four of the FCRA's disclosure requirements: § 1681e(d)(1); § 1681e(d)(2); § 1681b(b); and § 1681j(a)(1)(C). Am. Compl. ¶¶ 61-74. Spokeo simply fails to address these claims, even though they remain in the case as it comes to this Court and entail different forms of cognizable injury. For instance, Robins alleges that Spokeo has failed to disclose information about how consumers can request free access to its reports about them, in violation of 15 U.S.C. § 1681j(a)(1)(C). Am. Compl. ¶ 74. This Court's precedent firmly establishes that Article III standing may rest entirely on this kind of informa-

tional injury. *See, e.g., Fed. Election Comm'n v. Akins*, 524 U.S. 11, 21 (1998); *Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 449 (1989); *see generally* Cass R. Sunstein, *Informational Regulation and Informational Standing:* Akins *and Beyond*, 147 U. Penn. L. Rev. 613 (1999).

This injury is distinct from the economic injuries that Robins alleges, and is not addressed even by Spokeo's causation argument. Spokeo did not respond to this claim in the court below, *see* Br. of Appellee, *Robins v. Spokeo*, 2012 WL 4665532, and does not address it in its petition. But Robins has maintained this argument throughout the appeal, Appellant's Opening Br. 40, *Robins v. Spokeo*, 2012 WL 2132528, and it remains an independent basis for his standing. Like the causation issue, the sufficiency of Robins's informational injury is "predicate to an intelligent resolution of the question" Spokeo raises in its petition. *Ohio v. Robinette*, 519 U.S. 33, 38 (1996). While this case can be resolved without reaching Spokeo's question, Spokeo's question cannot be resolved without reaching fact-specific issues in this case. As such, this case is a poor vehicle for Spokeo's question.

II. There is no circuit split.

Even if this were a suitable vehicle for addressing the question presented, there is no need to do so because the lower courts are in harmony. Indeed, Spokeo does not offer any cases—not even a district court case—holding that a plaintiff who brings suit under the FCRA alleging a particularized injury does not have Article III standing.

Instead, Spokeo cites two ERISA cases: *David v. Alphin*, 704 F.3d 327 (4th Cir. 2013), and *Kendall v. Employees Retirement Plan of Avon Prods.*, 561 F.3d 112 (2d Cir. 2009). But the ERISA claims in these two cases

were different from the FCRA claims here in a fundamental way: They involve suits by plan members who sue "on behalf of the Pension Plan," and "are not permitted to recover individually." *David v. Alphin*, 704 F.3d at 332. They do not address the question whether an individual has standing when he brings a suit on his own behalf alleging that an illegal action has caused him a personal injury. The answer to that question is uncontroversial: yes.

In addition to not implicating the actual question presented by this case, these cases are not evidence of a circuit split on the question Spokeo claims is presented. The two ERISA cases that Spokeo cites deal only with a private cause of action, which is distinct from a "legal right[], the invasion of which creates standing." *Warth v. Seldin*, 422 U.S. 490, 500 (1975). When someone violates the fiduciary requirements of ERISA, they are liable to the retirement plan itself—not to the individual members of the plan. 29 U.S.C. §1109. The private cause of action is merely an enforcement mechanism. In contrast, the FCRA creates both a cause of action and an individualized right—when someone violates the FCRA with respect to a particular consumer, they are "liable to that consumer." 15 U.S.C. §1681n.

This means that these ERISA cases do not implicate the question whether Article III standing can be predicated solely on "statutes creating legal rights, the invasion of which creates standing." *Warth v. Seldin*, 422 U.S. at 500. The Second Circuit in *Kendall* itself cited that very statement in *Warth v. Seldin* with approval, accepting the notion that a right could be "statutorily created." *Kendall*, 561 F.3d at 119. But the court held that it was "a clear misstatement of the law" for the plaintiff to claim that the alleged ERISA violation was a

violation of an individual right bestowed on her by the statute. *Id.* As a result, Spokeo has cited no circuit case disagreeing with the decision below. The circuits that have addressed the question agree: "the actual-injury requirement may be satisfied *solely* by the invasion of a legal right that Congress *created*. This is not a novel principle within the law of standing." *Hammer v. Sam's E., Inc.*, 2014 WL 2524534 (8th Cir. 2014) (emphasis in original). *See Edwards v. First American Fin. Corp.*, 610 F.3d 514 (9th Cir. 2010), *cert. dismissed as improvidently granted*, 132 S. Ct. 2536; *Robey v. Shapiro, Marianos & Cejda, L.L.C.*, 434 F.3d 1208, 1211 (10th Cir. 2006); *Murray v. GMAC Mortgage Corp.*, 434 F.3d 948, 952 (7th Cir. 2006); *Beaudry v. TeleCheck Servs., Inc.*, 579 F.3d 702 (6th Cir. 2009); *Shaw v. Marriott Int'l, Inc.*, 605 F.3d 1039, 1042 (D.C. Cir. 2010). On any understanding of the question presented by this case no circuit split is implicated.

III. Robins has Article III standing.

The court of appeals correctly decided that Robins has standing. As explained above, Robins has alleged economic, reputational, and emotional injuries that affected him alone, by virtue of false information that was specifically published about him. Robins's alleged harm is the kind of actual, concrete, and particularized harm that is the *sine qua non* of Article III's injury-in-fact inquiry. *See Lujan*, 504 U.S. at 560. This case does not raise the question Spokeo presents, and Robins has standing under Article III.

Even if Robins had alleged that the only harm he suffered was the violation of his statutory rights under the FCRA, there would be nothing unusual about such an injury conferring standing as well. Because "legal injury is by definition no more than the violation of a legal

right; and legal rights can be created by the legislature," "standing['s]. existence in a given case is largely within the control of Congress." Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U. L. Rev. 881, 885 (1983). This Court has routinely noted that "[t]he actual or threatened injury required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing." *Warth v. Seldin*, 422 U.S. at 500; *see also Massachusetts v. E.P.A.*, 549 U.S. 497, 516 (2007) ("Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before."); *Lujan*, 504 U.S. at 578 ("[T]he injury required by Art[icle] III may exist solely by virtue of statutes creating legal rights. "); *Hardin v. Kentucky Utilities Co.*, 390 U.S. 1, 6 (1968); *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973). The statutory violations that Robins alleges would be an entirely legitimate basis for standing in this case in addition to his other alleged injuries.

Spokeo's question tries to distinguish between the violations of Robins's legal rights and the economic and reputational injuries he alleges, but such a distinction cannot be made consistent with centuries of case law. For hundreds of years, common-law courts have construed the violation of a legal right to be an injury that per se demands a remedy: "Every violation of a right imports some damage, and if none other be proved, the law allows a nominal damage." *Whittemore v. Cutter*, 29 F. Cas. 1120 (C.C.D. Mass. 1813) (Story, J.). The kind of injury Spokeo calls a "bare violation" of a legal right has been essential to many customary claims, including those surrounding violations of constitutional rights or con-

tractual rights, defamation, patent infringement, and more.[1] Entire statutory schemes are based on the premise that individuals can sue for violations of their legal rights without proving other injury: The Copyright Act, for instance, has provided for over one hundred years that infringement of copyright is itself a violation that gives rise to a claim for statutory damages without proof of other injury. *See* 17 U.S.C. § 504(c); *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 347-352 (1998) (reviewing history of statutory damages under state and federal copyright statutes). "Even for uninjurious and unprofitable invasions of copyright the court may, if it deems it just, impose a liability within statutory limits to sanction and vindicate the statutory policy." *F.W. Woolworth Co. v. Contemporary Arts, Inc.*, 344 U.S. 228, 233 (1952).

Nothing distinguishes this case from the many others that rest on the violation of a legal right per se (aside from the fact that the plaintiff here also alleges additional concrete harm). Whether the injured right comes from the Constitution, statute, or common law, this Court has stated that "there is absolutely no basis for making the Article III inquiry turn on the source of the asserted right." *Lujan*, 504 U.S. at 576. Nor does the fact that

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[1] *See, e.g., Carey v. Piphus*, 435 U.S. 247, 266 (1978) (holding that "denial of procedural due process [is] actionable for nominal damages without proof of actual injury"); *Wilcox v. Plummer's Ex'rs*, 29 U.S. 172, 181-82 (1830) (holding that nominal damages are available "immediately" upon breach of contract, before any other damages are proven); *Pollard v. Lyon*, 91 U.S. 225, 227 (1876) (upholding presumed damages for defamation per se); *Whittemore*, 29 F. Cas. 1120 (1813) (holding that a patent owner could recover nominal damages from a defendant who made, but never used or sold, an infringing machine).

Robins has brought his claim as a putative class action alter the standing inquiry, as the fact "[t]hat a suit may be a class action adds nothing to the question of standing. " *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 40 n.20 (1976). This Court should be hesitant to grant a question whose very premise cannot be made consistent with the case law, particularly when no split between the circuits has ventilated the issue or created a need to address it.

IV. Spokeo and its amici have greatly exaggerated the implications of this case.

Robins alleges the kind of concrete, particularized injury that courts have recognized for centuries. As a result, this case does not present the question that Spokeo raises, which by its own description involves cases where there is the "absence of any allegation of concrete and particularized injury." Pet. 2. And as for whether a plaintiff has standing when he alleges personal injury from the publication of false material about him, there is no unresolved question—the answer is clearly yes.

Spokeo's arguments about the importance of its question presented are exaggerated and ultimately counsel against hearing this case. Spokeo asserts that there will be "drastic and absurd" consequences if the lower court's decision is not overturned. Pet. 15. It is joined by several amici, some of whose briefs are nearly carbon copies of their past briefs in *Charvat*.[2] Their ar-

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[2] *Compare* Brief of ACA International as Amicus Curiae in Support of Petitioner, *Spokeo, Inc. v. Thomas Robins*, (No. 13-1339), *with* Brief of ACA International as Amicus Curiae in Support of Petitioners, *Mut. First Fed. Credit Union v. Charvat*, 134 S.Ct. 1515 (2014) (No. 13-679), 2014 WL 69413; *compare also* Brief of the Chamber of Commerce of The United States of America and the

(continued ...)

guments rest on three claims: that this question arises under a number of statutes, that it is particularly important in the class action context, and that it is raised by an increasing number of cases. Spokeo and its amici exaggerate the significance of each of these claims, and any argument that Spokeo's question arises frequently counsels against this Court taking a case with as many vehicle problems as this one.

First, Spokeo argues that its question presented arises under several federal laws, and deciding the question in this case would therefore resolve the "broad range" of cases that Spokeo claims raise the question as well. Pet. 19. But Spokeo gives no reason to believe that the answer to its question will be the same for all statutes. The FCRA has strong "analogs in our common-law tradition," a statute-specific consideration that is clearly relevant to the standing inquiry. *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring). In *First American*, for instance, much of the argument centered around the common-law analogs to the anti-kickback provisions of the Real Estate Settlement Procedures Act, one of the statutes that Spokeo cites. Transcript of Oral Argument at 17-22, *First American Fin. Corp. v. Edwards*, 132 S. Ct. 2536 (2012) (No. 10-708); Pet. 17. The fact-specific, law-specific issues in this case are not a panacea for all of the statutory claims Spokeo and its amici would like to resolve.

International Association of Defense Counsel as Amici Curiae in Support of Petitioner at 13, *Spokeo, Inc. v. Thomas Robins*, (No. 13-1339), *with* Brief of the Chamber of Commerce of the United States of America as Amicus Curiae in Support of Petitioners at 10, *Mut. First Fed. Credit Union v. Charvat*, 134 S.Ct. 1515 (2014) (No. 13-679), 2014 WL 47112, 10.

Second, Spokeo argues that its question is particularly important in the context of class actions. But again, the fact "[t]hat a suit may be a class action . . . adds nothing to the question of standing. . . ." *Simon v. E. Ky. Welfare Rights Org.*, 426 at 40 n.20. Especially in this case, in which the putative class has not even been certified, it would be inappropriate to grant certiorari based on the downstream implications of what might happen if a class ever were to come into existence.

If Spokeo were to prevail, it would have significant consequences for class actions. "[T]he constraints of Article III do not apply to state courts," *ASARCO Inc. v. Kadish*, 490 U.S. 605, 617 (1989). For this reason, the decision that Article III courts lack jurisdiction to hear entire categories of class actions would apply to federal courts only. Congress has recently found that state and local courts are "keeping cases of national importance out of federal courts," and implemented procedures for the removal of class actions from state to federal court. Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (2005). Spokeo's theory, that federal courts cannot constitutionally exercise jurisdiction in the large numbers of class actions that Spokeo claims would be affected, reverses this process. *See, e.g., Nat'l Consumers League v. Gen. Mills, Inc.*, 680 F. Supp. 2d 132, 136 (D.D.C. 2010) (remanding case from federal court because the plaintiff lacked Article III standing). The likely result of a victory for Spokeo would be a shift of class actions from federal courts, which have limited jurisdiction, to state courts of general jurisdiction. This Court should hesitate to grant certiorari on the basis of a theory that has not been adopted in any circuit and is in such tension with Congressional policy.

Finally, Spokeo argues that its question is important because this kind of litigation under the FCRA has "skyrocketed." Pet. 12. It is hard to reconcile Spokeo's claims about the "great frequency" of these FCRA cases, *id.*, with its failure to find an FCRA case as evidence of its purported circuit split. And if the number of cases raising Spokeo's question is really so voluminous, the Court should wait until a case arrives that serves as a better vehicle. Because Robins alleges concrete, particularized harms, this case does not even raise Spokeo's question. And because Robins's allegations are "predicate to an intelligent resolution of the question" Spokeo raises, *Robinette*, 519 U.S. at 38, the Court would have to wade through a fact-bound, case-specific inquiry to reach Spokeo's question—without the benefit of the lower court having done the same. This Court should not engage in such an exercise, and should not hear this case.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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August 6, 2014

REPLY BRIEF

No. 13-1339

In the Supreme Court of the United States

SPOKEO, INC.,

Petitioner,

v.

THOMAS ROBINS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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TABLE OF CONTENTS

Page

Table of Authorities ii

Reply Brief for the Petitioner 1

A. This Case Squarely Presents The Article III Question 2

B. The Conflict Among The Lower Courts Is Genuine And Deepening 6

C. As The Ten *Amicus* Briefs Explain, The Petition Presents A Question Of Very Substantial Importance 8

D. The Ninth Circuit's Holding Is Wrong 11

Conclusion 13

TABLE OF AUTHORITIES

Page(s)

CASES

Beaudry v. *TeleCheck Services, Inc.*,
579 F.3d 702 (6th Cir. 2009) 6

Carey v. *Piphus*,
435 U.S. 247 (1978) 4

Charvat v. *Mut. First Fed. Credit Union*,
725 F.3d 819 (8th Cir. 2013), cert. denied,
134 S. Ct. 1515 (2014) 5

Clapper v. *Amnesty Int'l USA*,
133 S. Ct. 1138 (2013) 1, 3

Consumer Watchdog v. *Wis. Alumni Research Found.*, 753 F.3d 1258 (Fed. Cir. 2014) 2, 7

David v. *Alphin*,
704 F.3d 327 (4th Cir. 2013) 6

Doe v. *Nat'l Bd. of Med. Exam'rs*,
199 F.3d 146 (3d Cir. 1999) 6

Dun & Bradstreet, Inc. v. *Greenmoss Builders, Inc.*, 472 U.S. 749 (1985) 4

First American Financial Corp. v. *Edwards*,
132 S. Ct. 2536 (2012) 4, 5

First National Bank of Wahoo v. *Charvat*,
134 S. Ct. 1515 (2014) 4

Fox Film Corp. v. *Doyal*,
286 U. S. 123 (1932) 12

Hammer v. *Sam's East, Inc.*,
754 F.3d 492 (8th Cir. 2014) 7

Joint Stock Soc'y v. *UDV N. Am., Inc.*,
266 F.3d 164 (3d Cir. 2001) 7

Kendall v. *Employees Retirement Plan of Avon Prods.*, 561 F.3d 112 (2d Cir. 2009) 6

TABLE OF AUTHORITIES—continued

Page(s)

Lea v. *Buy Direct L.L.C.*,
755 F.3d 250 (5th Cir. 2014) 10

Linda R.S. v. *Richard D.*,
410 U.S. 614 (1973) 11

Milkovich v. *Lorain Journal Co.*,
497 U.S. 1 (1990) 3

Opperman v. *Path, Inc.*,
2014 WL 1973378 (N.D. Cal. May 14, 2014) 10

Raines v. *Byrd*,
521 U.S. 811 (1997) 11

Ramirez v. *Trans Union LLC*,
2014 WL 3734525 (N.D. Cal. July 24, 2014) 9

Tourgeman v. *Collins Fin. Servs., Inc.*,
2014 WL 2870174 (9th Cir. June 25, 2014) 10

Warth v. *Seldin*,
422 U.S. 490 (1975) 11

White v. *Nicholls*,
44 U.S. 266 (1845) 4

In re Zynga Privacy Litig.,
750 F.3d 1098 (9th Cir. 2014) 10

STATUTES

Fair Credit Reporting Act
15 U.S.C. § 1681e 5
15 U.S.C. § 1681j 5

OTHER AUTHORITIES

William Prosser, Law of Torts (4th ed. 1971) 4

REPLY BRIEF FOR THE PETITIONER

The exceptional importance of the question presented—whether a mere statutory violation, without more, satisfies the constitutional requirement of an injury-in-fact—is underscored by the ten *amicus* briefs (on behalf of 17 individual companies, trade associations, and other organizations) urging the Court to grant review. It is difficult to imagine a more suitable case, given the Ninth Circuit's stark holding that "alleged violations of [a plaintiff's] statutory rights are sufficient to satisfy the injury-in-fact requirement of Article III." Pet. App. 8a.

Respondent tries mightily to obfuscate the court of appeals' ruling, devoting most of his brief in opposition to a series of imaginative injury-in-fact arguments. But the court of appeals specifically disavowed reliance on those grounds: having "determine[d] that [respondent] has standing by virtue of the alleged violations of his statutory rights," the court of appeals did "*not* decide whether harm to his employment prospects or related anxiety could be sufficient injuries in fact." Pet. App. 9a & n.3 (emphasis added). And for good reason—respondent's claim of hypothetical harm to indistinct future "prospects" and his speculative "subjective fear" are not cognizable injuries-in-fact. *Clapper* v. *Amnesty Int'l USA*, 133 S. Ct. 1138, 1150, 1153 (2013).

Equally misguided is respondent's argument—made for the first time in this Court—that he suffered "reputational" injury from information that inaccurately portrayed him as more educated and wealthier than he apparently is. Because respondent did not raise this argument below, the court of appeals did not address it. In any event, such favorable

information falls well outside the narrow category of falsehoods for which injury is presumed.

Respondent's claim that there is no conflict among the lower courts is equally unavailing. This case would have been dismissed if it had been filed in the Second or Fourth Circuits. And the Federal Circuit has now adopted the same rule. See *Consumer Watchdog* v. *Wis. Alumni Research Found.*, 753 F.3d 1258, 1262 (Fed. Cir. 2014).

When it comes to the significance of the Ninth Circuit's actual holding, respondent does not dispute that allowing injury-in-law to substitute for injury-in-fact effectively replaces the three-part standing test with a single question: whether the plaintiff has *alleged* a statutory violation. See Pet. 7–8, 22 & Pet. App. 9a. Respondent also does not dispute the dramatic expansion in the availability of class certification (and massive damages exposure) that results from eliminating the actual injury requirement. See Pet. 14.

Review by this Court is plainly warranted.

A. This Case Squarely Presents The Article III Question.

The question presented is whether the court of appeals' express holding—that "alleged violations" of a plaintiff's "statutory rights" automatically "satisfy the injury-in-fact requirement of Article III" (Pet. App. 8a)—is correct. Respondent studiously ignores this holding for the bulk of his argument (Opp. 4-18), urging this Court to deny review because the decision supposedly could have rested on other grounds.

Even if those other grounds were potentially meritorious, that argument would provide no reason to deny review of the legal issue that the court of ap-

peals indisputably *did* decide—particularly when, as here, the court of appeals expressly declined to address these alternative arguments. Pet. App. 9a n.3. Respondent would be free to raise those contentions on remand if this Court reverses the judgment below.

But it is not surprising that the Ninth Circuit declined to rest its holding on respondent's claims of actual injury. They are entirely meritless.

Respondent first asserts that information retrieved by Spokeo's search engine caused him concrete and particularized injury by (1) portraying him as more educated and wealthier than he is, and (2) making him worry that some potential employer might hold that favorable information against him. Opp. 3. Those contentions are foreclosed by this Court's rejection of "standing theories that rest on speculation about the decisions of independent actors" or on "subjective fear" about the same speculation. *Clapper*, 133 S. Ct. at 1150, 1153.[1]

And respondent's brand-new theory, not raised in the court of appeals—that nonderogatory information about his education, wealth, and marital status caused reputational injury merely because the information was inaccurate—is similarly flawed. Respondent points to the presumption of injury in defamation law, but that presumption applies only to false statements that ineluctably expose one "to hatred, contempt, or ridicule," *Milkovich* v. *Lorain*

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[1] Respondent is wrong to relabel as a "causation" analysis (Opp. 9) the holding in *Clapper*, which makes clear that "injury in fact" (133 S. Ct. at 1148) cannot arise from speculation about third-party responses to a defendant's activity or from subjective fear about those hypothetical responses. See *id.* at 1150, 1153.

Journal Co., 497 U.S. 1, 13 (1990); *White* v. *Nicholls*, 44 U.S. 266, 286 (1845), and that consequently are so "virtually certain to cause *serious* injury to reputation" that the law presumes an injury without demanding additional proof that it occurred. *Carey* v. *Piphus*, 435 U.S. 247, 262 & n.18 (1978) (emphasis added); see also *Dun & Bradstreet, Inc.* v. *Greenmoss Builders, Inc.*, 472 U.S. 749, 760 (1985) (quoting William Prosser, Law of Torts § 112, p. 765 (4th ed. 1971)).

Respondent's allegations here thus fall far short of what is needed to trigger presumed injury at common law. He argues instead for a much more expansive theory of presumed injury under which *any* factual error would be sufficient: injury-in-fact would exist whenever search results reflected transposed digits on an address or a misspelled middle name. Article III's injury-in-fact requirement bars litigation over such trifles. See also TransUnion Br. 15-17 (noting First Amendment concerns).

Respondent seems to contend that the mere fact that the complaint asserts "actual injury"—even though the court of appeals refused to rest its decision on that ground and even though the complaint's allegations do not satisfy the Article III standard set forth in this Court's decisions—makes this case a less attractive vehicle for resolving the issue presented than *First American Financial Corp.* v. *Edwards*, 132 S. Ct. 2536 (2012), or *First National Bank of Wahoo* v. *Charvat*, 134 S. Ct. 1515 (2014). See Opp. 7–9. But that would mean that any plaintiff could insulate an erroneous legal argument from review by this Court by including in the complaint allegations supporting multiple, legally deficient "fall-

back" contentions, even if those contentions are never addressed by any court.

Moreover, respondent cannot explain away the key distinctions favoring this case. The plaintiffs in *First American* had a direct relationship with the defendant that involved the payment of money and, the plaintiffs claimed, the equivalent of a transaction tainted by a breach of trust actionable at common law without proof of monetary injury. See Pet. 23–24; Tr. of Oral Arg. 41–45, *First American*, 132 S. Ct. 2536 (No. 10–708). The plaintiffs in *Charvat* claimed injury based on a fee charged by the defendants, alleging violation of a statute that had been repealed. *Charvat* v. *Mut. First Fed. Credit Union*, 725 F.3d 819, 821 (8th Cir. 2013), cert. denied, 134 S. Ct. 1515 (2014).

Respondent here, by contrast, had no commercial relationship of any sort with petitioner and paid no money to petitioner, and the FCRA is alive and well, generating dozens of new class actions every year. See Pet. 12–13 & n.5.

Finally, respondent mentions the other statutory violations alleged in the complaint (see Opp. 9–10; Pet. App. 4a–5a), but the complaint just asserts that Spokeo violated the cited statutes (Am. Compl. ¶¶ 61–74) without indicating whether or how respondent was injured; respondent told the Ninth Circuit only that his "personal statutory rights" were violated. C.A. Br. 39.

Under the holding below, the alleged failures to issue proper notices to providers and users of information (15 U.S.C. § 1681e(d)), or to post toll-free telephone numbers to allow consumers to request consumer reports (*id.* § 1681j(a)), arguably provide

standing to anyone who ventured on Spokeo's website without any further claim of harm. Respondent's reliance on these allegations confirms that his standing claim rests only on allegations of statutory violations without any actual injury.

B. The Conflict Among The Lower Courts Is Genuine And Deepening.

Respondent contends (Opp. 10–12) that there is no conflict because the holdings of the Ninth and Sixth Circuits, on one hand, and the Second or Fourth Circuits, on the other, did not all involve FCRA claims.

But respondent offers no way to reconcile the holding in this case (and *Beaudry* v. *TeleCheck Services, Inc.*, 579 F.3d 702 (6th Cir. 2009)) that "alleged violations of [a plaintiff's] statutory rights are sufficient to satisfy the injury-in-fact requirement of Article III" (Pet. App. 8a) with the Fourth Circuit's diametrically opposite constitutional holding that the mere "deprivation of [a] statutory right" cannot be "sufficient to constitute an injury-in-fact for Article III standing" (*David* v. *Alphin*, 704 F.3d 327, 338–39 (4th Cir. 2013)), because that "theory of Article III standing * * * conflates statutory standing with constitutional standing." *Ibid.*

There can be no doubt that, if this case had arisen in the Fourth Circuit, that court of appeals would apply *David* to reject respondent's claim of standing based on injury-in-law—the bare fact of a statutory violation without any proof of factual injury. Or that the Second Circuit would have rejected respondent's argument based on *Kendall* v. *Employees Retirement Plan of Avon Products*, 561 F.3d 112, 121 (2d Cir. 2009). See also *Doe* v. *Nat'l Bd. of Med. Exam'rs*, 199 F.3d 146, 153 (3d Cir. 1999) (Becker, C.J., joined by

Scirica and Alito, JJ.) ("Congress * * * cannot confer standing by statute alone."); *Joint Stock Soc'y* v. *UDV N. Am., Inc.*, 266 F.3d 164, 176 (3d Cir. 2001) (Alito, J.). Indeed, the Sixth and Ninth Circuits followed that precise approach, applying to FCRA claims their prior non-FCRA decisions holding that injury-in-law suffices to establish Article III standing. Pet. 10–11.

This conflict has deepened since we filed the petition. The Federal Circuit rejected the argument that a party's statutory right to judicial review of agency action sufficed to confer Article III jurisdiction over an appeal from a patent reexamination proceeding. The court acknowledged that "Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute," but—in square conflict with the decision in the present case—held that Congress's creation of a statutory right "does not eliminate the requirement that [the plaintiff] have a particularized, concrete stake in the outcome" of the case. *Consumer Watchdog*, 753 F.3d at 1262. Determining that the party invoking the statutory right lacked "an injury in fact for Article III purposes" (*ibid.*), the Federal Circuit dismissed the case for lack of standing.

Meanwhile, another court of appeals has joined the other side of the conflict: a divided panel of the Eighth Circuit followed the decision below. See *Hammer* v. *Sam's East, Inc.*, 754 F.3d 492, 500 (8th Cir. 2014).

Respondent does not dispute the ability of plaintiffs' counsel to prevent development of a conflict regarding the FCRA itself by choosing a favorable forum for nationwide class actions. See Pet. 11–12; DRI Br. 18–19; Experian Br. 11–12. Nevertheless, it is unmistakably clear that some courts of appeals

discern a difference between statutory violations and constitutional standing, that others do not, and that the ruling in this case would have differed based on where the lawsuit was filed.

C. As The Ten *Amicus* Briefs Explain, The Petition Presents A Question Of Very Substantial Importance.

Respondent claims (Opp. 15–18) that all seventeen *amici* misstate the importance of the question presented by this case. But there is a reason these parties expended the time and resources to file *amicus* briefs: The Ninth Circuit's holding has "great practical significance" because businesses are subject to a vast array of "technical legal duties" under myriad federal laws. Chamber of Commerce Br. 6.

As *amici* eBay, Facebook, Google, and Yahoo! explain, the decision below "implicates a broad swath of federal statutes that contain private rights of action and provide for statutory damages," and "invit[es] abusive and costly * * * class actions seeking millions or even billions of dollars in statutory damages under FCRA and similar statutes," including "numerous state statutes." eBay Br. 5, 11; see also Chamber of Commerce Br. 17–18 (providing examples); ACA Int'l Br. 16-17.

Specifically, "'aggregated statutory damages claims can result in absurd liability exposure in the hundreds of millions—or even billions—of dollars on behalf of a class whose actual damages are often nonexistent.'" DRI Br. 17–18 (citation omitted); see also eBay Br. 13–14 (noting $150 billion claim); Experian Br. 11–12 (exposure in another case reached "trillions"). "Under the Ninth Circuit rule, all it takes is one technical mistake to bankrupt a company."

Nat'l Ass'n of Prof'l Background Screeners Br. 12; see also Consumer Data Indus. Ass'n Br. 15, 18.

Respondent's arguments serve only to confirm the very substantial importance of this frequently recurring question.

1. Respondent scoffs (Opp. 18) at our description of the frequency with which FCRA class actions are filed (see Pet. 12–14 & nn.4–6), but the flood of lawsuits continues.[2]

That is not surprising given the impact of the decision below. Class certification is easier when injury-in-law can establish standing, because otherwise-disparate claims of causation and damages are transformed into class-wide common issues. See Pet. 15–16; *Ramirez* v. *Trans Union LLC*, 2014 WL 3734525, at *9-11, *14 (N.D. Cal. July 24, 2014) (certifying class because decision below rendered irrelevant "individualized question" whether class members were "actually injured"). Indeed, almost any FCRA class action could be recast in terms of an abstract, purely statutory harm. See Pet. 14–15.

2. Respondent also contends (Opp. 16) that the question here whether injury-in-law satisfies Article III standing for claims under the FCRA differs from whether a bare violation of other statutes satisfies Article III. But respondent does not explain why the same constitutional standard would apply differently, and cannot identify any material differences in the respective statutory formulations. See also Pet. 16–19.

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[2] Since the petition was filed, 46 additional putative class actions seeking statutory damages under the FCRA have been filed.

In fact, recent decisions demonstrate that courts embracing the injury-in-law theory apply it broadly to claims under different statutes. Thus, the Ninth Circuit has applied the very same theory to the Electronic Communications Privacy Act. See *In re Zynga Privacy Litig.*, 750 F.3d 1098, 1105 n.5 (9th Cir. 2014) ("Because the plaintiffs allege that Facebook and Zynga are violating statutes that grant persons in the plaintiffs' position the right to judicial relief, we conclude they have standing to bring this claim.").

The Ninth Circuit also relied on the decision below to find standing in a Fair Debt Collection Practices Act class action where the named plaintiff "could not have suffered any pecuniary loss or mental distress as the result of a letter that he did not encounter until months after it was sent—when related litigation was already underway." *Tourgeman* v. *Collins Fin. Servs., Inc.*, 2014 WL 2870174, at *5 (9th Cir. June 25, 2014). It was sufficient for Article III purposes, the court concluded, that the plaintiff asserted a "violation of his right not to be the target of misleading debt collection communications." *Ibid.* See also *Lea* v. *Buy Direct L.L.C.*, 755 F.3d 250, 254 (5th Cir. 2014) (court did "not perceive any harm here," but concluded, without addressing Article III, that "harm is not a prerequisite for relief" under the Truth in Lending Act); *Opperman* v. *Path, Inc.*, 2014 WL 1973378 (N.D. Cal. May 14, 2014) (applying decision below to find standing for several federal and state statutory claims).

3. Respondent maintains (Opp. 17) that reversing the decision below would simply displace no-injury class actions from federal to state court. That possibility provides no basis to disregard the limits of Article III, and is unlikely for several reasons, among

them that many state courts apply standing principles that restrict access to the courts by uninjured parties and nationwide class actions in state court would often violate constitutional limits on state court authority.

D. The Ninth Circuit's Holding Is Wrong.

Respondent offers only a cursory defense of the actual holding below. See Opp. 12–15. That effort chiefly consists of repackaging this Court's observation that "[t]he actual or threatened injury required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing.'" *Warth* v. *Seldin*, 422 U.S. 490, 500 (1975) (quoting *Linda R.S.* v. *Richard D.*, 410 U.S. 614, 617 n.3 (1973)).

But respondent never mentions, let alone explains, this Court's more recent clarification "that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing." *Raines* v. *Byrd*, 521 U.S. 811, 820 n.3 (1997). Respondent instead assumes a contrary conclusion: that, by providing a statutory cause of action without explicitly requiring proof of harm, Congress can confer constitutional standing on parties who have no injury-in-fact. And he does not dispute that the Ninth Circuit's circular approach to injury-in-fact would mean that the causation and redressability requirements were automatically met in such cases (see Pet. 7–8, 21–22), and that as a result Congress could massively expand the jurisdiction of the federal courts whenever it authorized statutory damages (see Pet. 22).

Respondent also advances a strained analogy to copyright (Opp. 14), but copyright confers a "property" interest—"the right to exclude others"—upon which an infringer trespasses. *Fox Film Corp.* v. *Doyal*, 286 U.S. 123, 127 (1932). Nothing remotely similar is at issue under FCRA (or other statutes with similar private-action provisions).

Ultimately, respondent is reduced to relying on the chestnut that every wrong has a remedy. Opp. 13. But respondent has not in fact been injured by any "wrong" here. And Article III limits the federal courts to claims involving an actual injury.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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In the Supreme Court of the United States

SPOKEO, INC., PETITIONER

v.

THOMAS ROBINS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether respondent's complaint identified an Article III injury-in-fact by alleging that petitioner had willfully violated 15 U.S.C. 1681e(b) by publishing inaccurate personal information about respondent in consumer reports prepared by petitioner without following reasonable procedures to assure the information's accuracy.

TABLE OF CONTENTS

Page

Interest of the United States 1
Statement 1
Discussion 7
A. Petitioner's publication of inaccurate information about respondent is an Article III injury-in-fact 8
B. Further review is not warranted 17
Conclusion 23

TABLE OF AUTHORITIES

Cases:

Black v. *Cutter Labs.*, 351 U.S. 292 (1956) 8
Blum v. *Yaretsky*, 457 U.S. 991 (1982) 23
California v. *Rooney*, 483 U.S. 307 (1987) 8
Consumer Watchdog v. *Wisconsin Alumni Research Found.*, 753 F.3d 1258 (Fed. Cir. 2014), cert. denied, No. 14-516 (Feb. 23, 2015) 22
DaimlerChrysler Corp. v. *Cuno*, 547 U.S. 332 (2006) 9, 16
David v. *Alphin*, 704 F.3d 327 (4th Cir. 2013) 20, 21
Department of Justice v. *Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989) 11
Department of State v. *Ray*, 502 U.S. 164 (1991) 11
Donoghue v. *Bulldog Investors Gen. P'ship*, 696 F.3d 170 (2d Cir. 2012), cert. denied, 133 S. Ct. 2388 (2013) 20
FEC v. *Akins*, 524 U.S. 11 (1998) 12
First Am. Fin. Corp. v. *Edwards*, cert. granted, 131 S. Ct. 3022 (2011), cert. dismissed, 132 S. Ct. 2536 (2012) 19
Friends of the Earth, Inc. v. *Gaston Copper Recycling Corp.*, 204 F.3d 149 (4th Cir. 2000) 21
Gertz v. *Robert Welch, Inc.*, 418 U.S. 323 (1974) 13

Cases—Continued: Page

Havens Realty Corp. v. *Coleman*, 455 U.S. 363 (1982) 12
Kendall v. *Employees Ret. Plan of Avon Prods.*, 561 F.3d 112 (2d Cir. 2009) 20, 21, 22
Lewis v. *Casey*, 518 U.S. 343 (1996) 16
Linda R.S. v. *Richard D.*, 410 U.S. 614 (1973) 9
Lopez v. *River Oaks Imaging & Diagnostic Grp., Inc.*, 542 F. Supp. 2d 653 (S.D. Tex. 2008) 15
Lujan v. *Defenders of Wildlife*, 504 U.S. 555 (1992) 8, 9, 10, 14, 18
M&G Polymers USA, LLC v. *Tackett*, 135 S. Ct. 926 (2015) 17
Massachusetts v. *EPA*, 549 U.S. 497 (2007) 9
Public Citizen v. *Department of Justice*, 491 U.S. 440 (1989) 12
Raines v. *Byrd*, 521 U.S. 811 (1997) 10
Robinson v. *Potter*, 453 F.3d 990 (8th Cir. 2006) 15
Safeco Ins. Co. v. *Burr*, 551 U.S. 47 (2007) 3
Simon v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26 (1976) 18
Sorrell v. *IMS Health Inc.*, 131 S. Ct. 2653 (2011) 12
Stein v. *National City Bank*, 942 F.2d 1062 (6th Cir. 1991) 15
Summers v. *Earth Island Inst.*, 555 U.S. 488 (2009) ...10, 15
Vermont Agency of Natural Res. v. *United States*, 529 U.S. 765 (2000) 13, 14, 18
Warth v. *Seldin*, 422 U.S. 490 (1975) 9
Whitmore v. *Arkansas*, 495 U.S. 149 (1990) 8

Constitution, statutes and regulations:

U.S. Const. Art. III .....*passim*

Statutes and regulations—Continued: Page

Employment Retirement Income Security Act of 1974, 29 U.S.C. 1001 *et seq.* 20
Fair Credit Reporting Act, 15 U.S.C. 1681 *et seq.* 1
15 U.S.C. 1681(b) 2
15 U.S.C. 1681a(d)(1) 2, 10
15 U.S.C. 1681a(f) 2
15 U.S.C. 1681b 2, 3
15 U.S.C. 1681b(a) 10
15 U.S.C. 1681b(a)(1)-(6) 14
15 U.S.C. 1681b(b)(1) 3, 16, 17
15 U.S.C. 1681e(b) ....*passim*
15 U.S.C. 1681e(d)(1) 17
15 U.S.C. 1681e(d)(1)(A) 2, 16
15 U.S.C. 1681e(d)(1)(B) 3, 16
15 U.S.C. 1681j(a) 3
15 U.S.C. 1681j(a)(1)(C) 3
15 U.S.C. 1681m 3
15 U.S.C. 1681n 3
15 U.S.C. 1681n(a) 4, 11, 17, 18
15 U.S.C. 1681n(a)(1)(A) 11
15 U.S.C. 1681o 3
15 U.S.C. 1681o(a)(1) 3
15 U.S.C. 1681s-2 2
Real Estate Settlement Procedures Act of 1974, 12 U.S.C. 2601 *et seq.* 19
29 U.S.C. 1109(a) 20
29 U.S.C. 1132(a)(2) 20
35 U.S.C. 311(a) 22
35 U.S.C. 314(b)(2) 22
35 U.S.C. 315(b) 22

Regulations—Continued: Page

12 C.F.R. 1022.137(a)(1) 3, 16, 17
16 C.F.R. 610.3(a)(1) (2012) 3

Miscellaneous:

3 Restatement (Second) of Torts (1977) 13
Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U. L. Rev. 881 (1983) 9
S. Rep. No. 517, 91st Cong., 1st Sess. (1969) 1

In the Supreme Court of the United States

No. 13-1339

SPOKEO, INC., PETITIONER

v.

THOMAS ROBINS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. In 1970, Congress enacted the Fair Credit Reporting Act (FCRA), 15 U.S.C. 1681 *et seq.*, "to prevent consumers from being unjustly damaged because of inaccurate or arbitrary information in a credit report," and "to prevent an undue invasion of the individual's right of privacy in the collection and dissemination of credit information." S. Rep. No. 517, 91st Cong., 1st Sess. 1 (1969). Congress imposed various obligations on consumer reporting agencies (CRAs) to

ensure that the consumer-reporting system "is fair and equitable to the consumer" regarding the "confidentiality, accuracy, relevancy, and proper utilization of [consumer-report] information." 15 U.S.C. 1681(b).

FCRA governs a CRA's handling of "consumer reports." A CRA is a person who, for monetary fees, dues, or on a cooperative basis, "regularly engages * * * in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties." 15 U.S.C. 1681a(f). With exceptions not relevant here, a "consumer report" is a CRA's "communication of * * * information" about a consumer that "is used or expected to be used or collected" for certain specified purposes—*e.g.*, to determine whether a consumer should be extended credit, insurance, or employment—if the information "bear[s] on [the] consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living." 15 U.S.C. 1681a(d)(1); see 15 U.S.C. 1681b (listing "[p]ermissible purposes of consumer reports").

Several FCRA requirements are potentially relevant to this case. First, FCRA requires that, in "prepar[ing] a consumer report," the CRA "shall follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates." 15 U.S.C. 1681e(b). Second, if a person "regularly and in the ordinary course of business furnishes information to [a CRA] with respect to any consumer," the CRA must provide that person with notice of its responsibilities under FCRA. 15 U.S.C. 1681e(d)(1)(A); cf. 15 U.S.C. 1681s-2 (responsibilities of persons furnishing such informa-

tion). Third, when the CRA provides a consumer report to any person, it must provide that person with notice of its responsibilities under FCRA. 15 U.S.C. 1681e(d)(1)(B); cf. 15 U.S.C. 1681b, 1681m. If the CRA provides such a report for "employment purposes," it must additionally provide the recipient with a summary of the consumer's FCRA rights, and it must obtain from that user a certification that the user has complied and will comply with certain FCRA requirements and will not use the report in violation of equal-employment-opportunity laws. 15 U.S.C. 1681b(b)(1). Fourth, FCRA's implementing regulations require that certain CRAs—namely, those that must provide consumers with a free annual copy of the information in their consumer-report file, 15 U.S.C. 1681j(a)—must clearly and prominently post on certain websites that the CRA owns or maintains a toll-free telephone number for requesting the free annual reports. 12 C.F.R. 1022.137(a)(1) (replacing 16 C.F.R. 610.3(a)(1) (2012)); cf. 15 U.S.C. 1681j(a)(1)(C).

FCRA grants a consumer a cause of action against any person who negligently or willfully violates "any requirement imposed [under FCRA] with respect to [that] consumer." 15 U.S.C. 1681n, 1681*o*. For negligent violations, the defendant is liable to the consumer for "actual damages" sustained. 15 U.S.C. 1681*o*(a)(1). Congress separately addressed "willful" conduct, which includes both "knowing violations" of FCRA and reckless violations reflecting a defendant's "objectively unreasonable" reading of FCRA that creates an "'unjustifiably high risk' of violating the statute." *Safeco Ins. Co.* v. *Burr*, 551 U.S. 47, 57, 68-70 (2007). If the defendant "willfully fails to comply with any requirement imposed under [FCRA] with respect to

any consumer," the defendant "is liable to that consumer" for (a) "any actual damages sustained" or statutory "damages of not less than $100 and not more than $1,000," plus (b) "punitive damages as the court may allow." 15 U.S.C. 1681n(a).

2. Petitioner seeks review of the court of appeals' determination that respondent's complaint sufficiently alleged an Article III injury-in-fact.

Respondent's putative class-action complaint alleged that petitioner is a CRA that operates a website, spokeo.com, on which users can obtain information about individuals. First Am. Compl. (FAC) ¶¶ 2, 51 (Dist. Ct. Doc. 40). Respondent alleged that any person can obtain from that website a wide range of information about the subject of a search, including the individual's "address, phone number, marital status, age, employment information, education, [and] ethnicity"; the "names of [his or her] siblings and parents"; and even "items [the individual has] sought from websites such as Amazon.com, and music [the individual has] listened to on websites such as Pandora.com." ¶ 16. Petitioner's website also allegedly provides information about the individual's "economic health" (which petitioner formerly labeled as a "credit estimate"), "wealth level," and, until shortly before respondent's complaint was filed, "mortgage value," "estimated income," and "investments." ¶¶ 18, 20. Petitioner has allegedly "actively marketed it[s] services to employers for the purpose of evaluating potential employees." ¶ 26; see ¶¶ 15, 27-29, 57.

Petitioner's website allegedly displayed a consumer report about respondent that inaccurately reported, *inter alia*, respondent's age and wealth and that respondent was employed, possessed a graduate degree,

and was married with children. FAC ¶¶ 30-32. Respondent alleged that petitioner had disseminated that erroneous information about him when he was "out of work and seeking employment," causing both past and continuing "actual harm to [his] employment prospects," monetary injury, and emotional injury from anxiety about his "diminished employment prospects." ¶¶ 34-37.

Respondent alleged that petitioner had violated 15 U.S.C. 1681e(b) by failing to "follow reasonable procedures to assure maximum possible accuracy" of his consumer-report information. FAC ¶¶ 53, 63-64. Respondent further alleged that petitioner had violated FCRA by failing to provide the requisite notice to those that furnish it information about consumers (¶¶ 58, 60-61); by failing to provide required notices to, and obtain certifications from, users of its consumer reports (¶¶ 59-60, 62, 67-70); and by failing to post a toll-free number on its website for requesting free annual reports (¶¶ 73-75). Respondent alleged that he had "suffered harm as described [in his complaint]" caused by those allegedly willful violations. ¶¶ 65, 71, 75. Respondent sought statutory damages and injunctive relief. FAC 16.

3. The district court initially denied petitioner's motion to dismiss. Pet. App. 15a-22a. The court concluded, as relevant here, that respondent had sufficiently alleged an Article III "injury in fact—the marketing of inaccurate consumer reporting information about [him]." *Id.* at 18a.

The district court later reconsidered its decision and dismissed the suit for lack of Article III standing. Pet. App. 23a-24a. The court concluded that a "[m]ere violation of [FCRA] does not confer Article III stand-

ing * * * where no injury in fact is properly pled," and that "the alleged harm to [respondent's] employment prospects" was too "speculative, attenuated and implausible" to satisfy constitutional requirements. *Id.* at 23a.

4. The court of appeals reversed and remanded. Pet. App. 1a-10a. The court framed the question before it as "whether [respondent] has Article III standing to sue a website's operator under [FCRA] for publishing inaccurate personal information about [respondent]." *Id.* at 1a. The court held that respondent's complaint satisfied Article III. *Id.* at 4a-9a.

The court of appeals explained that "Congress's creation of a private cause of action to enforce a statutory provision implies that Congress intended the enforceable provision to create a statutory right," and that "the violation of a statutory right is usually a sufficient injury in fact to confer standing." Pet. App. 6a. The court acknowledged that "the Constitution limits the power of Congress to confer standing." *Id.* at 7a. The court explained, however, that those limits do "not prohibit Congress from 'elevating to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law.'" *Id.* at 7a-8a (citation omitted).

Respondent's suit, the court of appeals concluded, does not violate any "constitutional limitations on congressional power to confer standing." Pet. App. 8a. The court explained that respondent was "among the injured" in that petitioner had allegedly "violated *his* statutory rights, not just the statutory rights of other people." *Ibid.* The court further held that "the interests protected by the statutory rights at issue are sufficiently concrete and particularized that Congress

can elevate them" by statute to Article III injuries. *Ibid.* The court additionally found that respondent's complaint had sufficiently alleged causation and redressability, and it accordingly held that respondent "adequately alleges Article III standing." *Id.* at 9a. In light of that holding, the court of appeals did not decide "whether harm to [respondent's] employment prospects or related anxiety could be sufficient injuries in fact." *Id.* at 9a n.3.

DISCUSSION

The court of appeals framed the question before it as "whether an individual has Article III standing to sue a website's operator under [FCRA] for publishing inaccurate personal information about himself." Pet. App. 1a. The court of appeals correctly answered that question in the affirmative, and its interlocutory decision does not conflict with any decision of this Court or any other court of appeals.

The petition for a writ of certiorari virtually ignores the specific statutory elements of respondent's FCRA cause of action and the specific allegations of respondent's complaint. Petitioner instead seeks to litigate the abstract question whether "a bare violation of a federal statute" satisfies Article III even when the plaintiff has "suffer[ed] no concrete harm." Pet. i. Petitioner appears to construe the decision below as holding that Congress has *plenary* power to create statutory causes of action, adjudicable in federal court, on behalf of whatever class of plaintiffs Congress chooses. See, *e.g.*, Pet. 12 (stating that "there is broad-based and long-standing disagreement in the lower courts over whether Article III places limitations on Congress's ability to create constitutional standing"). But while the court of appeals held that

respondent's own complaint satisfied Article III, the court specifically recognized that "the Constitution limits the power of Congress to confer standing." Pet. App. 7a.

In any event, "[t]his Court 'reviews judgments, not statements in opinions.'" *California* v. *Rooney*, 483 U.S. 307, 311 (1987) (per curiam) (quoting *Black* v. *Cutter Labs.*, 351 U.S. 292, 297 (1956)). The Ninth Circuit's only *holding* in this case was that respondent had satisfied Article III by alleging that a CRA had published inaccurate personal information about respondent in a consumer report. Because that holding is correct and does not conflict with any decision of another circuit, this Court's review is not warranted.

A. Petitioner's Publication Of Inaccurate Information About Respondent Is An Article III Injury-In-Fact

The court of appeals held that respondent had established Article III standing to sue petitioner "for publishing inaccurate personal information about [respondent]" because petitioner allegedly had violated respondent's "statutory rights" protecting his "personal interests in the handling of his credit information." Pet. App. 1a, 8a. The court below correctly concluded that the publication of such false information is a cognizable Article III injury.

1. To establish Article III standing, a plaintiff must demonstrate, *inter alia*, that he has sustained an actual or imminent "injury in fact." *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992). The requisite "injury in fact" is "an invasion of a legally protected interest." *Id.* at 560. That injury must be "concrete" and "particularized" (*ibid.*), *i.e.*, it must be "'distinct and palpable,' as opposed to merely 'abstract,'" *Whitmore* v. *Arkansas*, 495 U.S. 149, 155

(1990) (brackets and citations omitted). It must also "affect the plaintiff in a personal and individual way," *Defenders of Wildlife*, 504 U.S. at 560 n.1, rather than in "some indefinite way in common with people generally," *DaimlerChrysler Corp.* v. *Cuno*, 547 U.S. 332, 344 (2006) (citation omitted).

The Court has long recognized that the "injury required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing.'" *Warth* v. *Seldin*, 422 U.S. 490, 500 (1975) (quoting *Linda R.S.* v. *Richard D.*, 410 U.S. 614, 617 n.3 (1973)); accord *Defenders of Wildlife*, 504 U.S. at 578; see *Massachusetts* v. *EPA*, 549 U.S. 497, 516-517 (2007) ("Congress has the power to define injuries * * * that will give rise to a case or controversy where none existed before.") (quoting *Defenders of Wildlife*, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in the judgment)). Because an "injury in fact" is an "invasion of a legally protected interest," *Defenders of Wildlife*, 504 U.S. at 560, and because such an injury is "by definition no more than the violation of a legal right," it follows that "legal rights can be created by the legislature," and that the violation of such rights will constitute an injury-in-fact to the individual granted the "*personal*[]" right. See Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U. L. Rev. 881, 885 (1983).

This does not mean that Congress has *unlimited* power to define the class of plaintiffs who may sue in federal court to redress an alleged violation of law. Congress "cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing."

Raines v. *Byrd*, 521 U.S. 811, 820 n.3 (1997); see *Summers* v. *Earth Island Inst.*, 555 U.S. 488, 497 (2009) ("[T]he requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute."). In particular, "the public interest in proper administration of the laws" cannot "be converted into an individual right by a statute that denominates it as such, and that permits all citizens (or, for that matter, a subclass of citizens who suffer no distinctive concrete harm) to sue." *Defenders of Wildlife*, 504 U.S. at 576-577. But Congress may grant individuals statutory rights that, when violated, confer standing because such rights will "elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law." *Id.* at 578.

2. The decision below is consistent with those principles. FCRA requires each CRA to "follow reasonable procedures to assure maximum possible accuracy of the information concerning [an] individual" when it "prepares a consumer report" about him. 15 U.S.C. 1681e(b). Under the statutory definition, moreover, information contained within a CRA's private files cannot constitute a "consumer report." Rather, a "consumer report" is a CRA's actual "communication" of information that relates to a consumer and is either used or expected to be used or collected for specified purposes. 15 U.S.C. 1681a(d)(1); see 15 U.S.C. 1681b(a) (setting forth an exclusive list of the circumstances in which a CRA may disseminate a consumer report). FCRA thus grants an individual consumer a statutory entitlement to be free from a CRA's actual dissemination of inaccurate information about him

when the CRA fails to employ "reasonable procedures" to assure the information's accuracy.

To assist consumers in vindicating that statutory entitlement, Congress authorized a consumer to sue any person who has willfully violated "any requirement imposed under [FCRA] with respect to [that] consumer." 15 U.S.C. 1681n(a). A plaintiff who proves that a willful violation has occurred may recover "any actual damages sustained by the consumer as a result of the [violation] or [statutory] damages of not less than $100 and not more than $1,000." 15 U.S.C. 1681n(a)(1)(A). A CRA's willful failure to follow reasonable procedures to ensure that an accurate report about a consumer is disseminated violates a "requirement imposed under [FCRA] with respect to [that] consumer." 15 U.S.C. 1681n(a). It is also a concrete and particularized injury to the consumer because it involves the actual, specific, and non-abstract act of disseminating information about the particular consumer.

3. Petitioner contends (Pet. 21) that its alleged "retransmi[ssion] [of] inaccurate personal information about [respondent]" cannot support standing without an "allegation of tangible harm." But the dissemination of inaccurate information about respondent in violation of respondent's statutory rights *is* a "tangible harm." Courts have long recognized similar legally protected interests, and the violation of those interests is a sufficient basis for Article III standing.

For example, "both the common law and the literal understandings of privacy encompass the individual's control of information concerning his or her person." *Department of Justice* v. *Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 763 (1989); *Depart-*

ment of State v. *Ray*, 502 U.S. 164, 175 (1991) (noting the "privacy interest" of named individuals in avoiding public disclosure of their "personal information regarding marital and employment status"). That legally protected interest is particularly salient in modern-day society given the proliferation of large databases and the ease and rapidity with which information about individuals can be transmitted and retransmitted across the Internet. Indeed, "[t]he capacity of technology to find and publish personal information * * * presents serious and unresolved issues with respect to personal privacy and the dignity it seeks to secure." *Sorrell* v. *IMS Health Inc.*, 131 S. Ct. 2653, 2672 (2011).[1]

In this case, moreover, respondent alleges that petitioner violated FCRA by disseminating *inaccurate* personal information about him. See Pet. App. 1a. Respondent's FCRA cause of action to redress an

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[1] This Court has also held in diverse contexts that the violation of an individual's statutory right to *receive* information is itself an Article III injury-in-fact, even if the plaintiff does not identify any further consequential harm resulting from the denial. A violation of one's statutory right to obtain "truthful information about available housing" without regard to race, for instance, is an injury-in-fact even if the person requesting the information does not actually seek to procure housing. *Havens Realty Corp.* v. *Coleman*, 455 U.S. 363, 373-374 (1982). The denial of a more general statutory right to obtain specified information from a defendant is also a "sufficiently distinct injury to provide standing." *Public Citizen* v. *Department of Justice*, 491 U.S. 440, 449 (1989); see *ibid.* ("Our decisions interpreting the Freedom of Information Act have never suggested that those requesting information under it need show more than that they sought and were denied specific agency records."); *FEC* v. *Akins*, 524 U.S. 11, 22-23 (1998) (suit to vindicate statutory right to "receive particular information about campaign-related activities" satisfied Article III).

alleged statutory violation of that character closely tracks causes of action "traditionally amenable to, and resolved by, the judicial process" at common law. See *Vermont Agency of Natural Res.* v. *United States*, 529 U.S. 765, 774 (2000) (citation omitted). That historical analog is "particularly relevant to the constitutional standing inquiry." *Ibid.* Common-law courts have long adjudicated suits for defamation even absent "evidence of actual loss." *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 349 (1974); see 3 Restatement (Second) of Torts § 621, at 319 caveat (1977) (noting the "traditional common law rule allowing recovery [for defamation] in the absence of proof of actual harm"); *id.* § 620 & cmt. b, at 317-318 (all written and certain oral defamations are actionable for at least nominal damages). The long history of judicial recognition of such suits is "well nigh conclusive" proof that respondent's claim arising from the publication of false information about him satisfies Article III's requirements. See *Vermont Agency*, 529 U.S. at 777.

Petitioner argues (Reply Br. 4) that, at common law, defamation suits without a showing of consequential harm were limited to contexts in which the falsehood was so egregious that "the law presume[d] an injury." That is incorrect. At common law, plaintiffs could recover for *any* written defamation without a showing of consequential harm, and for certain oral defamatory statements, even when those false statements were of an "insignificant character" and were unaccompanied by resulting reputational or other harm. 3 Restatement (Second) of Torts § 620 cmts. a & b, at 317-318; see *id.* § 568 cmt. b, at 178-180; *id.* §§ 569-574, at 182-197.

In any event, Congress's power to create a cause of action for dissemination of inaccurate personal information is not limited to the precise categories of falsehoods that were actionable *per se* at common law. Congress has constitutional authority to "define new legal rights" in new contexts, *Vermont Agency*, 529 U.S. at 773, and thereby to "broaden[]" the "categories of injury that may be alleged in support of standing," *Defenders of Wildlife*, 504 U.S. at 578 (citation omitted). See *id.* at 580 (Kennedy, J., concurring in part and concurring in the judgment) ("Congress has the power to define injuries * * * that will give rise to a case or controversy where none existed before."). Authorizing suits for a CRA's publication of inaccurate information in a consumer report is, at the very most, a modest legislative expansion of the circumstances under which the dissemination of inaccurate personal information will be treated as an actionable wrong even without proof of further consequential harm. In this regard, it bears emphasis that CRAs generally are authorized to furnish consumer reports (at least to persons other than the consumer himself) only in specified circumstances where the recipient can be expected to use the report as a basis for some concrete (and often commercial) decision. See 15 U.S.C. 1681b(a)(1)-(6). Congress could reasonably conclude that the inclusion of false information in a report of that character should be treated as a legally cognizable injury to the individual consumer involved, even though the precise nature and extent of any later consequential harms may be difficult to verify in individual cases.[2]

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[2] Petitioner suggests (Reply Br. 1-2) that respondent was not injured because petitioner publicized "favorably" false information

Although petitioner focuses in part on the possibility that FCRA suits of this character may produce large damages awards (see Pet. 12-16), the logical implications of its position are not limited to suits for monetary relief. Article III standing requirements apply equally to suits for equitable relief to bring a halt to ongoing unlawful conduct. See *Summers*, 555 U.S. at 493 ("To seek injunctive relief, a plaintiff must show that he is under threat of suffering [an] 'injury in fact.'"). Under petitioner's theory, Congress cannot authorize federal courts to enjoin the continued dissemination of demonstrably inaccurate personal information about the plaintiff unless the plaintiff establishes a likelihood of further consequential injury.

4. The court of appeals focused on respondent's claim that petitioner violated Section 1681e(b) by "publishing inaccurate personal information about him[]" in its consumer report (Pet. App. 1a) without using "reasonable procedures to assure maximum possible accuracy of the information," 15 U.S.C. 1681e(b). Although the court correctly held that re-

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about him. That contention is misplaced. Whether particular inaccurate information is "favorable" or "unfavorable" often depends on the circumstances under which that information is disclosed. An employer may reject a job applicant if he is "overqualified by virtue of [his education]," *Robinson* v. *Potter*, 453 F.3d 990, 994 (8th Cir. 2006) (college graduate); see *Stein* v. *National City Bank*, 942 F.2d 1062, 1064 (6th Cir. 1991) (discussing "policy of not hiring college graduates"), or if it perceives him to be untruthful about any matter because of contrary information in a (potentially inaccurate) consumer report, cf. *Lopez* v. *River Oaks Imaging & Diagnostic Grp., Inc.*, 542 F. Supp. 2d 653, 662 (S.D. Tex. 2008) (discussing "policy against hiring an applicant who lied during the interview process"). FCRA thus sensibly requires "reasonable procedures" to ensure that a CRA's dissemination of information about an individual is as accurate as possible. 15 U.S.C. 1681e(b).

spondent had standing to pursue that claim, that conclusion does not establish respondent's standing to bring any other FCRA claim. "[S]tanding is not dispensed in gross." *DaimlerChrysler Corp.*, 547 U.S. at 353 (quoting *Lewis* v. *Casey*, 518 U.S. 343, 358 n.6 (1996)). Rather, "a plaintiff must [separately] demonstrate standing for each claim he seeks to press," even if those claims "derive from a 'common nucleus of operative fact.'" *Id.* at 352 (citation omitted).

The court of appeals' analysis was therefore incomplete. In addition to his Section 1681e(b) claim, respondent has asserted claims based on petitioner's alleged failure to give persons that regularly furnish it information notice of their responsibilities (15 U.S.C. 1681e(d)(1)(A)); to give required notices to, and obtain requisite certifications from, the persons to whom petitioner provides consumer reports (15 U.S.C. 1681b(b)(1), 1681e(d)(1)(B)); and to post a toll-free number on its website for consumers seeking a free annual report (12 C.F.R. 1022.137(a)(1)). Standing to bring those claims presumably does not rest on the same injury considered by the court of appeals—the publication of inaccurate personal information about respondent—because the FCRA provisions on which those claims are premised apply without a publication of information about the plaintiff (see 15 U.S.C. 1681e(d)(1)(A)), and even when a CRA disseminates *accurate* information (see 15 U.S.C. 1681b(b)(1), 1681e(d)(1)(B); 12 C.F.R. 1022.137(a)(1)).

The court of appeals' failure to evaluate respondent's standing on a claim-by-claim basis, however, is largely attributable to the parties' own failure to argue below that each claim must be separately analyzed. Respondent's other claims may ultimately be

subject to more searching standing analysis at a later stage of this litigation. But the question whether respondent has Article III standing with respect to alleged statutory violations *other than* his false-information claim does not warrant this Court's review. That is so both because "[t]his Court is one of final review, not of first view," *M&G Polymers USA, LLC* v. *Tackett*, 135 S. Ct. 926, 937 (2015) (citation omitted), and because the petition for a writ of certiorari does not identify the court of appeals' failure to analyze each claim separately as an error warranting review.[3]

B. Further Review Is Not Warranted

Petitioner contends (Pet. i) that review is warranted to decide "[w]hether Congress may confer Article III standing upon a plaintiff who suffers no concrete harm * * * by authorizing a private right of action based on a bare violation of a federal statute." As explained above, however, public dissemination of inaccurate personal information about the plaintiff *is* a form of "concrete harm" that courts have traditionally acted to redress, whether or not the plaintiff can

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[3] Respondent's other claims also implicate additional preliminary questions involving issues distinct from his Section 1681e(b) claim. For example, FCRA provides a consumer a right of action to sue for statutory damages for willful violations of "requirement[s] imposed under [FCRA] with respect to a[] consumer," 15 U.S.C. 1681n(a). It has yet to be resolved whether a CRA violates FCRA requirements "with respect to a[] consumer" when the CRA fails to provide notices to those who regularly furnish it information and to users of its consumer reports (15 U.S.C. 1681e(d)(1)); fails to convey other information to and obtain certifications from certain users (15 U.S.C. 1681b(b)(1)); or fails to post a toll-free telephone number on certain CRA websites (12 C.F.R. 1022.137(a)(1)).

prove some further consequential injury. Petitioner identifies no court of appeals decision that has found such harm to be insufficient to satisfy Article III.

1. Contrary to petitioner's contention, the courts of appeals do not disagree on "whether Article III places limitations on Congress's ability to create constitutional standing," Pet. 12. Consistent with the general understanding that such limitations exist, the court below recognized that "the Constitution limits the power of Congress to confer standing." Pet. App. 7a. Neither a plaintiff's bare desire to bring about the "proper administration of the laws," *Defenders of Wildlife*, 504 U.S. at 576, nor his "abstract concern with a subject that could be affected by [the] adjudication," *Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 40 (1976), would be sufficient to satisfy Article III, even if Congress authorized plaintiffs to file suit in federal court to vindicate such interests. Nor could Congress confer standing by granting a plaintiff a right that arises only as "a 'byproduct' of the suit itself." *Vermont Agency*, 529 U.S. at 773.

Congress's authority to enact "statutes creating legal rights, the invasion of which creates standing," *Defenders of Wildlife*, 504 U.S. at 578 (citation omitted), ultimately turns on whether the invasion of those rights is concrete and particularized with respect to the plaintiff in the case. See pp. 8-9, *supra*. That inquiry can be cogently made only by examining the specific interest asserted by a particular plaintiff and the specific contours of a particular statutory cause of action. The private right of action at issue in this case states that any person who willfully violates any FCRA requirement "with respect to any consumer is liable to that consumer." 15 U.S.C. 1681n(a). Con-

sistent with that limitation, respondent alleged that petitioner had disseminated false personal information *about respondent himself*, not simply that petitioner had violated the law.

Because petitioner has identified no court of appeals decision that has reached a contrary result with respect to the statutory claim at issue here, this case does not warrant further review. But if the Court does grant certiorari, it should reformulate the question presented along the lines set forth in this brief. See p. I, *supra* ("Whether respondent's complaint identified an Article III injury-in-fact by alleging that petitioner had willfully violated 15 U.S.C. 1681e(b) by publishing inaccurate personal information about respondent in consumer reports prepared by petitioner without following reasonable procedures to assure the information's accuracy."). That reformulation would ensure that any merits briefing appropriately focuses on the specific allegations and statutory cause of action at issue in this case.[4]

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[4] In contrast to the highly abstract question on which petitioner seeks review, the questions presented in *First American Financial Corp.* v. *Edwards*, 131 S. Ct. 3022 (2011), cert. dismissed, 132 S. Ct. 2536 (2012) (per curiam), appropriately focused on the specific statutory scheme and cause of action at issue in that case. The petitioners in *First American Financial Corp.* quoted the relevant substantive and remedial provisions of the Real Estate Settlement Procedures Act of 1974 (RESPA), and they asked the Court to determine whether "a private purchaser of real estate settlement services" had statutory and constitutional standing to sue under RESPA "in the absence of any claim that the alleged violation affected the price, quality, or other characteristics of the settlement services provided." Pet. at i, *First Am. Fin. Corp.*, *supra* (No. 10-708). This Court granted certiorari on the second of the two questions presented in the petition. 131 S. Ct. 3022. There is consequently no basis for petitioner's suggestion (Pet. 2) that

2. Petitioner contends that the decision below conflicts with decisions of the Second and Fourth Circuits. See Pet. 9-10 (discussing *David* v. *Alphin*, 704 F.3d 327 (4th Cir. 2013), and *Kendall* v. *Employees Retirement Plan of Avon Products*, 561 F.3d 112 (2d Cir. 2009)). That is incorrect. As the Second Circuit has explained, when "a plaintiff's claim of injury in fact depends on legal rights conferred by statute, it is the particular statute and the rights it conveys that guide the standing determination." *Donoghue* v. *Bulldog Investors Gen. P'ship*, 696 F.3d 170, 178 (2d Cir. 2012), cert. denied, 133 S. Ct. 2388 (2013). The plaintiffs in both *David* and *Kendall* brought claims under ERISA, and neither decision speaks to the Article III question presented in this FCRA case.

In *David*, participants in a defined-benefit pension plan sued the plan's administrators for violating ERISA-imposed fiduciary duties. 704 F.3d at 329-330, 332-339; see 29 U.S.C. 1109(a), 1132(a)(2). The Fourth Circuit concluded that, although ERISA authorized certain suits by participants on behalf of ERISA plans, the question in *David* was whether the plaintiff-participants had suffered an Article III injury allowing them "to bring ERISA claims on behalf of a defined benefit pension plan" that was "overfunded." 704 F.3d at 333. The court concluded, as petitioner suggests (Pet. 10), that a statutory "right" to bring suit on behalf of a plan could satisfy "statutory standing" requirements without ensuring that the plaintiff possessed "constitutional standing." 704 F.3d at 338; cf. *id.* at 333. But the court ultimately held that the

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"the question presented here" is the same question on which the Court previously granted certiorari in *First American Financial Corp.*

plaintiff-participants did not suffer an injury allowing them to enforce statutory duties on behalf of the plan more generally, *id.* at 334-336, and that their asserted risk of injury to themselves was too speculative, *id.* at 336-338. *David* did not involve either FCRA or the release of inaccurate personal information about the plaintiff, and nothing in the decision undermines the Fourth Circuit's "well established" view that an Article III injury "'may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing.'" *Friends of the Earth, Inc.* v. *Gaston Copper Recycling Corp.*, 204 F.3d 149, 156 (4th Cir. 2000) (citation omitted). *David* merely reflects the conclusion that ERISA did not create such a right for the plaintiffs in that case.

The Second Circuit in *Kendall* similarly held that a retirement-plan participant lacked Article III standing to sue a plan administrator for breaching ERISA-imposed duties. 561 F.3d at 118-121. The court recognized that an injury-in-fact "may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing." *Id.* at 118 (citation omitted). It explained, however, that a plaintiff must still show "some injury or deprivation of a right, even if that right is statutorily created." *Id.* at 118-119. As petitioner notes (Pet. 10), the court stated that Kendall could not ground her claimed injury-in-fact in "a deprivation of her entitlement to [a] fiduciary duty," but was required instead to establish "some injury or deprivation of a specific right that arose from a violation of that [fiduciary] duty." 561 F.3d at 121. But that statement simply reflects the court's earlier, statute-specific conclusion that ERISA "does not confer a right to every plan participant to sue the plan

fiduciary for alleged ERISA violations without a showing that they were injured." *Id.* at 120.

Petitioner's reliance (Reply Br. 2, 7) on *Consumer Watchdog* v. *Wisconsin Alumni Research Foundation*, 753 F.3d 1258 (Fed. Cir. 2014), cert. denied, No. 14-516 (Feb. 23, 2015), is also misplaced. Pursuant to 35 U.S.C. 311(a) and 314(b)(2), Consumer Watchdog requested inter partes reexamination of a patent by the Patent Trial and Appeal Board (Board), a unit within the Patent and Trademark Office. See 753 F.3d at 1260, 1262. The Board rejected Consumer Watchdog's challenge to the patent, and the organization sought judicial review of that decision pursuant to 35 U.S.C. 315(b), which "allows a third party requester to appeal decisions favorable to patentability." 753 F.3d at 1262. The Federal Circuit dismissed the appeal because "the Board's denial of Consumer Watchdog's request did not invade any legal right conferred upon Consumer Watchdog," *ibid.*, and the organization "ha[d] not identified a particularized, concrete interest in the patentability of the [relevant] patent, or any injury in fact flowing from the Board's decision," *id.* at 1263. The court in *Consumer Watchdog* recognized that a generalized desire to have federal agencies obey the law is insufficient to confer Article III standing, even if the plaintiff (or appellant) falls within a broad class of persons whom Congress has authorized to seek judicial relief. But the court below in this case recognized that "the Constitution limits the power of Congress to confer standing," Pet. App. 7a, and respondent's FCRA claim (based on alleged public dissemination of false personal information about respondent himself) bears no relation to the challenge in *Consumer Watchdog*.

3. Petitioner argues (Pet. 12-16) that review is warranted because putative class actions threaten defendants with significant amounts of aggregated damages when plaintiffs seek recovery of statutory damages for class-wide FCRA violations without proof of further, consequential injury. But the courts below have not yet determined whether class certification is appropriate in this case, much less resolved the merits of respondent's claims or quantified potential statutory damages. In any event, the standing inquiry is the same for a named plaintiff in a putative class action as for a plaintiff asserting only individual claims. *Blum* v. *Yaretsky*, 457 U.S. 991, 1001 n.13 (1982). For the reasons stated above, the specific Article III standing question that is presented by this case does not warrant the Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 2015

AMICUS CURIAE BRIEF

No. 13-1339

Supreme Court, U.S.
JUN 4 - 2014
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

SPOKEO, INC.,

Petitioner,

v.

THOMAS ROBINS, individually and on behalf of all others similarly situated,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF ACA INTERNATIONAL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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Table of Contents

Page

Table of Cited Authorities ii

Interest of the *Amicus Curiae* 1

Summary of Argument 3

Argument 5

I. Standing is a fixed constitutional principle that Congress cannot expand by statute 5

II. The statute at issue is one of a class of statutes that creates liability without requiring injury in fact. 7

III. The court below, and other courts that have upheld liability against a defendant without injury to the plaintiff, did not adequately consider the standing requirement's constitutional dimensions. 14

IV. This case's implications go beyond the statute at issue, and affect the credit-and-collection industry at every level. 16

Conclusion 18

Table of Cited Authorities

Page(s)

Cases

Alston v. Countrywide Fin. Corp.,
585 F.3d 753 (3d Cir. 2009) 15

Baker v. G.C. Servs. Corp.,
677 F.2d 775 (9th Cir. 1982) 14

Beaudry v. TeleCheck Servs., Inc.,
579 F.3d 702 (6th Cir. 2009) 14

Carroll v. Wolpoff & Abramson,
53 F.3d 626 (4th Cir. 1995) 14

David v. Alphin,
704 F.3d 327 (4th Cir. 2013) 16

Edwards v. First Am. Corp.,
610 F.3d 514 (9th Cir. 2010) 14, 15

Gladstone, Realtors v. Village of Bellwood,
441 U.S. 91 (1979) 7

Harper v. Better Bus. Servs., Inc.,
961 F.2d 1561 (11th Cir. 1992) 14

Horne v. Flores,
557 U.S. 433 (2009) 5, 6

Keele v. Wexler,
149 F.3d 589 (7th Cir. 1998) 14, 15

Kendall v. Employees Ret. Plan of Avon Prods.,
561 F.3d 112 (2d Cir. 2009) 16

Linda R.S. v. Richard D.,
410 U.S. 614 (1973) 6

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992) 5, 6

Mahoney v. Wash. Mut., Inc. (In re Mahoney),
368 B.R. 579 (Bankr. W.D. Tex. 2007) 12

Raines v. Byrd,
521 U.S. 811 (1997) 7

Robey v. Shapiro, Marianos & Cejda, LLC,
434 F.3d 1208 (10th Cir. 2006) 15

Sierra Club v. Morton,
405 U.S. 727 (1972) 6

Simon v. E. Ky. Welfare Rights Org.,
426 U.S. 26 (1976) 6

Summers v. Earth Island Inst.,
555 U.S. 488 (2009) 7

United States v. SCRAP,
412 U.S. 669 (1973) 7

Valley Forge Christian Coll. V. Americans United for Separation of Church & State, Inc., 454 U.S. 464 (1982) 7

Warth v. Seldin, 422 U.S. 490 (1975) 5, 6

Statutes

15 U.S.C. § 1640(a) 17

15 U.S.C. § 1681n(a) 16

15 U.S.C. § 1692(a) 9

15 U.S.C. § 1692(b) 9

15 U.S.C. § 1692(e) 9

15 U.S.C. § 1692b–92g 10

15 U.S.C. § 1692d(5) 10

15 U.S.C. § 1692k(a) 17

47 U.S.C. § 227(b)(1) 13

47 U.S.C. § 227(b)(3)(B) 17

Consumer Credit Protection Act 7, 9

Electronic Fund Transfer Act 8

ERISA 16

Fair & Accurate Credit Transactions Act 16

Fair Credit Reporting Act 8, 16

Fair Debt Collection Practices Act ..... *passim*

Telephone Consumer Protection Act 9, 12, 17

Truth in Lending Act 17

Other Authorities

Restatement (Second) of Torts § 652B cmt. d, illus. 8 (1977) 8

BRIEF OF ACA INTERNATIONAL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Interest of the *Amicus Curiae*[1]

ACA International, the Association of Credit and Collection Professionals, is a not-for-profit corporation based in Minneapolis, Minnesota. Founded in 1939, ACA brings together nearly 3,400 member organizations and their more than 300,000 employees worldwide, including third-party collection agencies, asset buyers, attorneys, creditors, and vendor affiliates. ACA produces a wide variety of products, services, and publications, including educational and compliance-related information; and articulates the value of the credit-and-collection industry to businesses, policymakers, and consumers. ACA regularly files briefs as an amicus curiae in cases of interest to its membership.

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[1]No counsel for any Party authored this brief in whole or in part. Neither any such counsel nor any Party made a monetary contribution intended to fund this brief's preparation or submission. No person (other than Amicus Curiae ACA International, its members, and its counsel) made such a monetary contribution.

The counsel of record for all Parties received timely notice under Rule 37.2(a) of ACA International's intention to file an *amicus curiae* brief. All the Parties have granted consent.

ACA's members include sole proprietorships, partnerships, and corporations ranging from small businesses to firms that employ thousands of workers. These members include the very smallest of businesses, which operate within a limited geographic range of a single state; and the very largest of multinational corporations, which operate in every state and outside the United States. About three-quarters of ACA's company members have fewer than 25 employees. ACA helps its members serve their communities and meet the challenges created by changing markets through leadership, education, and service.

Through their attempts to recover outstanding accounts, ACA's members act as an extension of every community's businesses. ACA's members represent the local hardware store, the retailer down the street, and the family doctor. They work with these businesses, large and small, to obtain payment for the goods and services received by consumers, and each year, their combined effort results in the recovery of billions of dollars that are returned to businesses and reinvested in local communities. Without an effective collection process, these businesses' economic viability — and, by extension, the local and national economies in general — are threatened. At the very least, absent effective collections, consumers would be forced to pay more for their purchases to compensate for uncollected debts.

Finally, ACA's members also help governments in recovering unpaid obligations — a function that is increasingly important as many governments face record budget deficits.

Summary of Argument

Standing is a fixed constitutional principle that Congress cannot expand by statute. Congress can enact statutes that create new rights, and Congress can create remedies for those rights. But Congress cannot abrogate the constitutional principle of standing altogether: "broadening the categories of injury that may be alleged in support of standing is a different matter from abandoning the requirement that the party seeking review must himself have suffered an injury." That requirement of injury in fact — "that the party seeking review be himself among the injured" — is an "irreducible constitutional minimum" without which a federal court lacks jurisdiction.

The statute at issue is one of a class of statutes that creates liability without requiring injury in fact. Consumer credit protection is a field that Congress has regulated extensively in the last several decades, beginning with the Consumer Credit Protection Act in 1968. Many consumer-credit statutes created private rights of action to redress injuries for which there was no adequate remedy at common law. But sometimes the remedies that Congress devised for the practices

that it prohibited have gone beyond the harms that Congress was trying to address. More to the point, Congress sometimes devised remedies that offered relief even to plaintiffs who were never harmed at all.

Several federal courts of appeals have allowed plaintiffs to recover statutory damages under consumer-protection statutes without any proof of actual damages — that is, they have let the plaintiffs recover for an injury in law without having suffered an injury in fact. A statute may be "blind when it comes to distinguishing between plaintiffs who have suffered actual damages and those who have not," but the Constitution is not. Most courts of appeals that have upheld liability against a defendant without injury to the plaintiff did not even consider the standing requirement's constitutional dimensions. Other courts of appeals that have considered the constitutional issue have concluded that a statutory violation confers constitutional standing. Yet other courts of appeals have delved adequately into this Court's standing jurisprudence and correctly held that an uninjured plaintiff lacks constitutional standing. This Court should resolve the various approaches that the courts of appeals have taken, and insist upon consideration of the standing requirement's constitutional dimensions. This case is the right medium for that message.

This case's implications go beyond the statute at issue, and affect the credit-and-collection industry at every level. The Fair Credit Reporting

Act is far from the only consumer-protection statute that provides for statutory damages independent of whether the plaintiff suffered actual damages. These statutes affect the credit-and-collection industry, daily, and at every level, from the issuance of credit to the collection of debt in default. ACA therefore joins the Petitioner in asking that this Court grant the petition for a writ of certiorari.

Argument

I. Standing is a fixed constitutional principle that Congress cannot expand by statute.

Standing is "the threshold question in every federal case, determining the power of the court to entertain the suit."[2] Standing is "an essential and unchanging part of the case-or-controversy requirement of Article III,"[3] and it requires that "a plaintiff must present an injury that is concrete, particularized, and actual or imminent; fairly traceable to the defendant's challenged action; and redressable by a favorable ruling."[4]

Congress can enact statutes that create new rights, and Congress can create remedies for those

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[2] *Warth v. Seldin*, 422 U.S. 490, 498 (1975).

[3] *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992), *quoted in Horne v. Flores*, 557 U.S. 433, 445 (2009).

[4] *Horne*, 557 U.S. at 445 (citing *Lujan*, 504 U.S. at 560–61).

rights. But Congress cannot abrogate the constitutional principle of standing altogether: "broadening the categories of injury that may be alleged in support of standing is a different matter from abandoning the requirement that the party seeking review must himself have suffered an injury."[5] That requirement of injury in fact — "that the party seeking review be himself among the injured"[6] — is an "irreducible constitutional minimum"[7] without which a federal court lacks jurisdiction: "The Art. III judicial power exists only to redress or otherwise to protect against injury to the complaining party, even though the court's judgment may benefit others collaterally. A federal court's jurisdiction therefore can be invoked only when the plaintiff himself has suffered 'some threatened or actual injury resulting from the putatively illegal action . . .'"[8] To abandon that requirement "would convert the judicial process into 'no more than a vehicle for the vindication of the value interests of concerned bystanders,'" and

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[5] *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 39 (1976).

[6] *Lujan*, 504 U.S. at 563 (quoting *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972)).

[7] *Id.* at 560.

[8] *Warth v. Seldin*, 422 U.S. 490, 499 (1975) (quoting *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 (1973)).

the "courts of the United States into judicial versions of college debating forums."[9]

Thus, "the requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute,"[10] and "Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing."[11]

II. The statute at issue is one of a class of statutes that creates liability without requiring injury in fact.

Consumer credit protection is a field that Congress has regulated extensively in the last several decades, beginning with the Consumer Credit Protection Act in 1968.[12] Since its original enactment, the Consumer Credit Protection Act has been amended dozens of times, and many of those amendments are very familiar to most federal

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[9] *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 473 (1982) (quoting *United States v. SCRAP*, 412 U.S. 669, 687 (1973)).

[10] *Summers v. Earth Island Inst.*, 555 U.S. 488, 497 (2009).

[11] *Raines v. Byrd*, 521 U.S. 811, 820 n. 3 (1997) (citing *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979)).

[12] Pub. L. No. 90-321, 82 Stat. 176 (1968) (codified at 15 U.S.C. ch. 41).

courts because they have been so heavily litigated — among them the the Fair Debt Collection Practices Act;[13] the Electronic Fund Transfer Act;[14] and the Fair Credit Reporting Act,[15] the statute at issue in the subject petition for a writ of certiorari.

Many consumer-credit statutes created private rights of action to redress injuries for which there was no adequate remedy at common law. For example, the Restatement of Torts is both clear and explicit that an unwanted communication in an attempt to collect a debt is not an invasion of privacy, even where the creditor knows that the communication is unwanted: "A, a landlord, calls upon B, his tenant, at nine o'clock on Sunday morning, to demand payment of the rent, although he knows that B is not ready to pay it and that B objects to such a visit on Sunday. B is seriously annoyed. This is not an invasion of B's privacy."[16] When Congress enacted the Fair Debt Collection Practices Act in 1977, it found that "[t]here is abundant evidence of the use of abusive, deceptive,

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[13]Pub. L. No. 95-109, 91 Stat. 874 (1977) (codified at 15 U.S.C. ch. 41, subch. V).

[14]Pub. L. No. 95-630, tit. XX, 92 Stat. 3641, 3728, *in* Financial Institutions Regulatory & Interest Rate Control Act of 1978 (codified at 15 U.S.C. ch. 41, subch. VI).

[15]Pub. L. No. 91-508, 84 Stat. 1127 (1970) (codified at 15 U.S.C. ch. 41, subch. III).

[16]Restatement (Second) of Torts § 652B cmt. d, illus. 8 (1977).

and unfair debt collection practices by many debt collectors,"[17] but that "[e]xisting laws and procedures for redressing these injuries are inadequate to protect consumers."[18] Congress passed the Fair Debt Collection Practices Act both "to eliminate abusive debt collection practices by debt collectors" and "to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged."[19]

Likewise, when Congress enacted the Telephone Consumer Protection Act of 1991[20] (which is not a part of the Consumer Credit Protection Act), it found that "[o]ver half the States now have statutes restricting various uses of the telephone for marketing, but telemarketers can evade their prohibitions through interstate operations; therefore, Federal law is needed to control residential telemarketing practices."[21] Congress also found that "[i]ndividuals' privacy rights, public safety interests, and commercial freedoms of speech and trade must be balanced in a

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[17] 15 U.S.C. § 1692(a) (abusive practices).

[18] 15 U.S.C. § 1692(b) (inadequacy of laws).

[19] 15 U.S.C. § 1692(e) (purposes).

[20] Pub. L. No. 102-243, 105 Stat. 2394 (1991) (codified at 47 U.S.C. § 227).

[21] *Id.*, § 2(7) (not codified in U.S.C.).

way that protects the privacy of individuals and permits legitimate telemarketing practices."[22]

But sometimes the remedies that Congress devised for the practices that it prohibited have gone beyond the harms that Congress was trying to address. More to the point, Congress sometimes devised remedies that offered relief even to plaintiffs who were never harmed at all.

The Fair Debt Collection Practices Act, for example, mandates or prohibits conduct by debt collectors "in connection with the collection of any debt" in 43 separate paragraphs, each containing one or more specific mandates or prohibitions.[23] One such prohibition applies to "[c]ausing a telephone to ring or engaging any person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number."[24] A person whom a debt collector "engag[es] in telephone conversation repeatedly or continuously" surely has standing to complain of the statutory violation. So would a consumer who had to listen to "a telephone . ring repeatedly or continuously." But what if a debt collector "[c]aus[ed] a telephone to ring repeatedly or continuously," but nobody was home, so nobody heard the telephone? Even if the debt

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[22] *Id.*, § 2(9) (not codified in U.S.C.).

[23] *See* 15 U.S.C. § 1692b–92g.

[24] 15 U.S.C. § 1692d(5).

collector was calling "with intent to annoy, abuse, or harass any person at the called number," that intent was fruitless; it calls to mind one federal judge's analysis of why intent is irrelevant without effect (in that case, in connection with the alleged violation of a discharge injunction in bankruptcy):

> A plaintiff proves nothing by proving an intent to violate the discharge injunction as such. Certainly it is relevant to know whether the defendant intended to do the *act* that *constitutes* a violation of the discharge, because, without that intent, an action for contempt would fail. But it is unnecessary to demonstrate an intent to violate the discharge injunction as such.
>
> It is also irrelevant. An example helps to explain why. A creditor, smarting from the write-off of his loan, privately sacrifices a goat to Mercury, the Roman god of merchants, believing devoutly that Mercury will see to it that the debtor repays the creditor in full. The creditor takes no actions to publicize his sacrifice. He has no reason to believe that the debtor believes in Mercury, or cares about goats. Certainly, the sacrifice is an intentional act, and it was subjectively intended to collect the debt. Indeed, it might be easy to show that the

> creditor, "with malice aforethought," had every intent to violate the dickens out of the bankruptcy discharge. But so what? All the intention in the world would not convert the creditor's sacrifice into "an act to collect, recover, or offset" the debt in question. Intentionally performing a useless and ineffective act cannot violate section 524(a) because a useless and ineffective act will not count as a proscribed act within the meaning of the statute — regardless of the avowed "intent to violate the discharge injunction."[25]

Yet the Fair Debt Collection Practices Act would let a consumer who never heard the phone ring, but who learns about a debt collector's calls long after the fact by looking at his phone records for some totally unrelated purpose, assert a claim under the Act.

Similar issues arise under the Telephone Consumer Protection Act. One of the Act's most frequently litigated provisions says that

> It shall be unlawful for any person within the United States, or any person outside the United States

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[25] *Mahoney v. Wash. Mut., Inc. (In re Mahoney)*, 368 B.R. 579, 587 (Bankr. W.D. Tex. 2007) (court's emphasis; citation omitted).

> if the recipient is within the United States—
>
> (A) to make any call (other than a call . made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice—
>
> (iii) to any telephone number assigned to a . cellular telephone service .[26]

The prohibited act is merely "to make any call" to a cell phone using "any automatic telephone dialing system or an artificial or prerecorded voice," regardless of whether the called party is even aware of the call being made.[27]

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[26] 47 U.S.C. § 227(b)(1) (prohibitions).

[27] *See, e.g., Golan v. Veritas Entm't, LLC*, No. 4:14CV000069 ERW, 2014 U.S. Dist. LEXIS 68910, at *39 (E.D. Mo. May 20, 2014) ("The sum of [Plaintiffs'] knowledge about their alleged injury was based upon what someone else told them, after the fact.").

III. The court below, and other courts that have upheld liability against a defendant without injury to the plaintiff, did not adequately consider the standing requirement's constitutional dimensions.

Several federal courts of appeals have allowed plaintiffs to recover statutory damages under consumer-protection statutes without any proof of actual damages — that is, they have let the plaintiffs recover for an injury in law without having suffered an injury in fact.[28] As one such court explained in a case under the Fair Debt Collection Practices Act, "The FDCPA does not require proof of actual damages as a precursor to the recovery of statutory damages. In other words,

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[28] *See, e.g.*, *Edwards v. First Am. Corp.*, 610 F.3d 514, 516–18 (9th Cir. 2010) ("the damages provision in RESPA gives rise to a statutory cause of action whether or not an overcharge occurred"); *Beaudry v. TeleCheck Servs., Inc.*, 579 F.3d 702, 705–07 (6th Cir. 2009) ("The [Fair Credit Reporting] Act does not require a consumer to wait for unreasonable credit reporting procedures to result in the denial of credit or other consequential harm before enforcing her statutory rights."); *Keele v. Wexler*, 149 F.3d 589, 593–94 (7th Cir. 1998); *Carroll v. Wolpoff & Abramson*, 53 F.3d 626, 629 (4th Cir. 1995) (affirming award of statutory damages where plaintiff abandoned claim for actual damages); *Harper v. Better Bus. Servs., Inc.*, 961 F.2d 1561, 1563 (11th Cir. 1992) (affirming award of statutory damages where plaintiff "offered no proof of actual damages"); *Baker v. G.C. Servs. Corp.*, 677 F.2d 775, 780 (9th Cir. 1982) ("no indication in the statute than [an] award of statutory damages must be based on proof of actual damages").

the Act is blind when it comes to distinguishing between plaintiffs who have suffered actual damages and those who have not."[29]

A statute may be "blind when it comes to distinguishing between plaintiffs who have suffered actual damages and those who have not," but the Constitution is not. Most courts of appeals that have upheld liability against a defendant without injury to the plaintiff did not even consider the standing requirement's constitutional dimensions. Other courts of appeals that have considered the constitutional issue have concluded that a statutory violation confers constitutional standing: "Congress may expand the range or scope of injuries that are cognizable for purposes of Article III standing by enacting statutes which create legal rights."[30] Yet other courts of appeals have delved adequately into

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[29]*Keele v. Wexler*, 149 F.3d at 593–94 (citations omitted).

[30]*Robey v. Shapiro, Marianos & Cejda, LLC*, 434 F.3d 1208, 1212 (10th Cir. 2006); *see also Charvat v. Mut. First Fed. Credit Union*, 725 F.3d 819, 823 (8th Cir. 2013) ("plaintiffs need not show actual damages, beyond a statutory violation, in order to recover statutory damages"); *Edwards v. First Am. Corp.*, 610 F.3d 514, 517 (9th Cir. 2010) ("we must look to the text of RESPA to determine whether it prohibited Defendants' conduct; if it did, then Plaintiff has demonstrated an injury sufficient to satisfy Article III"); *Alston v. Countrywide Fin. Corp.*, 585 F.3d 753, 755 (3d Cir. 2009) ("Countrywide's invasion of that statutory right, even without a resultant overcharge, was an injury-in-fact for purposes of Article III standing").

this Court's standing jurisprudence and correctly held that an uninjured plaintiff lacks constitutional standing.[31]

This Court should resolve the various approaches that the courts of appeals have taken, and insist upon consideration of the standing requirement's constitutional dimensions. This case is the right medium for that message.

IV. This case's implications go beyond the statute at issue, and affect the credit-and-collection industry at every level.

The Fair Credit Reporting Act, which includes the Fair & Accurate Credit Transactions Act, provides for "any actual damages sustained by the consumer as a result of the failure or damages of not less than $100 and not more than $1,000," plus punitive damages, for willful noncompliance.[32] But the Fair Credit Reporting Act is far from the only consumer-protection statute that provides for

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[31] *See David v. Alphin*, 704 F.3d 327, 338–39 (4th Cir. 2013) ("Appellants failed to plead that they personally have sustained a concrete and particularized injury-in-fact"); *Kendall v. Employees Ret. Plan of Avon Prods.*, 561 F.3d 112, 121 (2d Cir. 2009) ("While plan fiduciaries have a statutory duty to comply with ERISA . . . , Kendall must allege some injury or deprivation of a specific right that arose from a violation of that duty in order to meet the injury-in-fact requirement.").

[32] 15 U.S.C. § 1681n(a).

statutory damages independent of whether the plaintiff suffered actual damages:

- The Truth in Lending Act provides for "any actual damage sustained by [the plaintiff] as a result of the failure" and for statutory damages based on the finance charge, as well as costs and fees.[33]
- The Fair Debt Collection Practices Act provides for "any actual damage sustained by [the plaintiff] as a result of such failure" and for "such additional damages as the court may allow."[34]
- The Telephone Consumer Protection Act provides for "an action to recover for actual monetary loss from such a violation, or to receive $500 in damages for each such violation, whichever is greater."[35]

These statutes affect the credit-and-collection industry, daily, and at every level, from the issuance of credit to the collection of debt in default. ACA therefore joins the Petitioner in asking that this Court grant the petition for a writ of certiorari.

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[33] 15 U.S.C. § 1640(a).

[34] 15 U.S.C. § 1692k(a).

[35] 47 U.S.C. § 227(b)(3)(B) (private right of action).

Conclusion

This Court should grant the petition for a writ of certiorari.

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AMICUS CURIAE BRIEF

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In the Supreme Court of the United States

SPOKEO, INC.,

Petitioner,

v.

THOMAS ROBINS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF THE *AMICI CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 3

ARGUMENT 7

I. THE DECISION BELOW TRANSFORMS A TECHNICAL STATUTORY VIOLATION INTO ARTICLE III STANDING 7

II. THE DECISION BELOW INVITES ABUSIVE CLASS-ACTION LITIGATION 13

CONCLUSION 21

TABLE OF AUTHORITIES

Page(s)

Cases

Allen v. *Wright*, 468 U.S. 737 (1984) 3, 4, 9

Amchem Prods., Inc. v. *Windsor*,
521 U.S. 591 (1997).....15

Ariz. Christian Sch. Tuition Org. v. *Winn*,
131 S. Ct. 1436 (2011).....21

AT&T Mobility LLC v. *Concepcion*,
131 S. Ct. 1740 (2011).....20

Bateman v. *Am. Multi-Cinema, Inc.*,
623 F.3d 708 (9th Cir. 2010).....16, 17

Bateman v. *Am. Multi-Cinema, Inc.*,
No. 2:07-CV-00171-FMC-AJWX,
Docket No. 114 (C.D. Cal. Oct. 11, 2011) 17

Beaudry v. *TeleCheck Servs., Inc.*,
579 F.3d 702 (6th Cir. 2009).....13

Bond v. *United States*,
No. 12-158 (June 2, 2014) 12

Clark v. *Martinez*, 543 U.S. 371 (2005) 12

Coopers & Lybrand v. *Livesay*,
437 U.S. 463 (1978).....20

Dowell v. *Wells Fargo Bank, NA*,
517 F.3d 1024 (8th Cir. 2008).....12

TABLE OF AUTHORITIES—cont'd

Page(s)

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610 F.3d 514 (9th Cir. 2010),
cert. granted, 131 S. Ct. 3022 (2011),
cert. dismissed as improvidently granted,
132 S. Ct. 2536 (2012) (per curiam) 8

Elk Grove Unified Sch. Dist. v. *Newdow*,
542 U.S. 1 (2004).....3

Evans v. *U-Haul Co. of Cal.*,
No. CV 07-2097-JFW, 2007 WL 7648595
(C.D. Cal. Aug. 14, 2007) 19

Fed. Election Comm'n v. *Akins*,
524 U.S. 11 (1998).....10

First Am. Fin. Corp. v. *Edwards*,
132 S. Ct. 2536 (2012).....2

Frisby v. *Schultz*, 487 U.S. 474 (1988) 12

Gladstone, Realtors v. *Vill. of Bellwood*,
441 U.S. 91, 100 (1979).....5, 9, 11

Harris v. *Experian Info. Solutions, Inc.*,
No. 6:06-cv-1808-GRA, Docket No. 201
(D.S.C. June 30, 2009) 16

Hoffmann-La Roche Inc. v. *Sperling*,
493 U.S. 165 (1989).....20

In re Facebook Privacy Litig.,
791 F Supp. 2d 705 (N.D. Cal. 2011).....19

Jerman v. *Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573 (2010).....18

TABLE OF AUTHORITIES—cont'd

Page(s)

Jerman v. *Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, No. 1:06-cv-1397, 2011 WL 1434679 (N.D. Ohio Apr. 14, 2011) 18-19

Kendall v. *Employees Ret. Plan of Avon Prods.*, 561 F.3d 112 (2d Cir. 2009) 18

Lexmark Int'l, Inc. v. *Static Control Components, Inc.*, 134 S. Ct. 1377 (2014) 3

Lujan v. *Defenders of Wildlife*, 504 U.S. 555 (1992) 3, 9

Murray v. *GMAC Mortgage Corp.*, 434 F.3d 948 (7th Cir. 2006) 20

O'Shea v. *Littleton*, 414 U.S. 488 (1974) 4

Public Citizen v. *U.S. Dep't of Justice*, 491 U.S. 440 (1989) 10

Raines v. *Byrd*, 521 U.S. 811 (1997) 5

Schlesinger v. *Reservists Comm. to Stop the War*, 418 U.S. 208 (1974) 3, 4, 9

Shady Grove Orthopedic Assocs., P.A. v. *Allstate Ins. Co.*, 559 U.S. 393 (2010) 20

Sierra Club v. *Morton*, 405 U.S. 727 (1972) 8

Specht v. *Netscape Commc'ns Corp.*, 150 F. Supp. 2d 585 (S.D.N.Y. 2001), *aff'd*, 306 F.3d 17 (2d Cir. 2002) 17

TABLE OF AUTHORITIES—cont'd

Page(s)

Specht v. *Netscape Commc'ns Corp.*,
Nos. 00-4871, *et al.*, Docket No. 94
(S.D.N.Y. Apr. 22, 2005), *aff'd sub nom.*
Weindorf v. *Netscape Commc'ns Corp.*,
173 F. App'x 44 (2d Cir. 2006). 18

Specht v. *Netscape Commc'ns Corp.*,
Nos. 1:00-CV-4871, *et al.*, 2000 WL
34500293 (S.D.N.Y. Aug. 3, 2000) 18

Specht v. *Netscape Commc'ns Corp.*,
Nos. 1:00-CV-4871, *et al.*, 2004 WL
5475796 (S.D.N.Y. Sept. 2, 2004) 17

Steel Co. v. *Citizens for a Better Env't*,
523 U.S. 83 (1998) 3-4, 9

Summers v. *Earth Island Inst.*,
555 U.S. 488 (2009) 4, 5, 11

Taylor v. *Acxiom Corp.*,
612 F.3d 325 (5th Cir. 2010) 19

Trafficante v. *Metro. Life Ins. Co.*,
409 U.S. 205 (1972) 8

Trans Union LLC v. *Fed. Trade Comm'n*,
536 U.S. 915 (2002) 14

United States v. *Richardson*,
418 U.S. 166 (1974) 4

US Fax Law Ctr., Inc. v. *iHire, Inc.*,
362 F. Supp. 2d 1248 (D. Colo. 2005) 13

TABLE OF AUTHORITIES—cont'd

Page(s)

Valley Forge Christian Coll. v. *Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982) 4, 7

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Warth v. *Seldin*, 422 U.S. 490 (1975) 8, 9

Weindorf v. *Netscape Commc'ns Corp.*, 173 F. App'x 44 (2d Cir. 2006) 18

White v. *E-Loan, Inc.*, No. C 05-02080, 2006 WL 2411420 (N.D. Cal. Aug. 18, 2006) 15

Statutes and Rules

2 U.S.C. § 437g(a)(1) 10

15 U.S.C. § 1681 12

15 U.S.C. § 1681c(g) 17

15 U.S.C. § 1692 18

18 U.S.C. § 2510 17

18 U.S.C. § 2721 19

18 U.S.C. § 2722 19

18 U.S.C. § 2723 19

18 U.S.C. § 2724 19

18 U.S.C. § 2725 19

TABLE OF AUTHORITIES—cont'd

Page(s)

47 U.S.C. § 227(b) 13

Fed. R. Civ. P. 23(a)(2) 14

Fed. R. Civ. P. 23(b)(3) 14

Other Authorities

Jonathan H. Adler, *Standing Still in the Roberts Court*, 59 CASE W. RES. L. REV. 1061 (2009) 11

http://www.stop-junk-fax-spam.com/services.html (last visited June 3, 2014) 13

John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 DUKE L.J. 1219 (1993) 3, 4, 5, 11, 12

S. Rep. No. 109-14 (2005) 6, 20

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and has an underlying membership of more than three million businesses and organizations of every size, in every industry, sector, and geographic region of the country—making it the principal voice of American business.

The International Association of Defense Counsel (the "IADC") is an association of corporate and insurance attorneys from the United States and around the globe whose practice is concentrated on the defense of civil lawsuits. It is dedicated to the just and efficient administration of civil justice and continual improvement of the civil justice system. The IADC supports a justice system in which plaintiffs are fairly compensated for genuine injuries, responsible defendants are held liable for appropriate

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[1] Counsel of record for all parties received notice of the *amici*'s intent to file this brief at least ten days before its due date. The parties consented to the filing of this brief, and written documentation of their consent is being submitted concurrently. No counsel for a party wrote this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae*, their members, or their counsel made a monetary contribution intended to fund its preparation or submission.

damages, and non-responsible defendants are exonerated without unreasonable cost.

Amici regularly advocate for the interests of their members in federal and state courts throughout the country in cases of national concern. This is one of those cases.

Like *First American Financial Corp.* v. *Edwards*, 132 S. Ct. 2536 (2012), which presented but did not resolve the same issue (and in which both the Chamber and the IADC participated as *amici curiae*), this case presents both a danger and an opportunity. If the decision below is allowed to stand, there is a serious danger of continued erosion of the minimum requirements for standing under Article III of the Constitution. Such a danger is of grave concern to the business community because (as this case illustrates) alleged technical violations of regulatory statutes can often affect large numbers of people without actually injuring them. If, as the Ninth Circuit held (following its precedent in *Edwards*) such people can bring lawsuits without the need to demonstrate any injury beyond the alleged statutory violation itself, businesses will predictably be tied up in damages litigation over harmless alleged lapses, diverting their resources from more productive uses. This case presents an opportunity to rein in abusive litigation over such trifles, and to restore proper constitutional limitations on no-injury lawsuits.

INTRODUCTION AND SUMMARY OF ARGUMENT

A plaintiff cannot state a case or controversy under Article III without first establishing that he has standing to sue. See, *e.g.*, *Allen* v. *Wright*, 468 U.S. 737, 750-751 (1984). "From Article III's limitation of the judicial power to resolving 'Cases' and 'Controversies,' and the separation-of-powers principles underlying that limitation," this Court has "deduced a set of requirements that together make up the 'irreducible constitutional minimum of standing.'" *Lexmark Int'l, Inc.* v. *Static Control Components, Inc.*, 134 S. Ct. 1377, 1386 (2014) (quoting *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). "The plaintiff must [1] have suffered or be imminently threatened with a concrete and particularized 'injury in fact' that is [2] fairly traceable to the challenged action of the defendant and [3] likely to be redressed by a favorable judicial decision." *Ibid.* Each of the three requirements serves a different, critical role in "enforc[ing] the Constitution's case-or-controversy requirement." *Elk Grove Unified Sch. Dist.* v. *Newdow*, 542 U.S. 1, 11 (2004). "If Congress directs the federal courts to hear a case in which the requirements of Article III are not met, that Act of Congress is unconstitutional." John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 DUKE L.J. 1219, 1226 (1993) (discussing *Defenders of Wildlife*).

Injury-in-fact—a "[c]oncrete injury, whether actual or threatened[—]is that indispensable element of a dispute which serves in part to cast it in a form traditionally capable of judicial resolution." *Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U.S. 208, 220-221 (1974). It is the "foremost" element of the inquiry, *Steel Co.* v. *Citizens for a Better Env't*,

523 U.S. 83, 103 (1998), the one that "adds the essential dimension of specificity to the dispute by requiring that the complaining party have suffered a particular injury caused by the action challenged as unlawful," *Schlesinger*, 418 U.S. at 221. In doing so, it ensures "that the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Valley Forge Christian Coll.* v. *Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982); see also Roberts, *supra*, 42 DUKE L.J. at 1224 ("The need to insist upon meaningful limitations on what constitutes injury for standing purposes * * * flows from an appreciation of the key role that injury plays in restricting the courts to their proper function in a limited and separated government.").

Though injury-in-fact "incorporates concepts concededly not susceptible of precise definition," *Allen*, 468 U.S. at 751, this Court has worked hard to ensure that the requirement is not rendered "meaningless" or "mere talk," *United States* v. *Richardson*, 418 U.S. 166, 194 n.16 (1974) (Powell, J., concurring). Thus, "[t]he complaining party [is] required to allege a *specific* invasion of th[e] right suffered by him." *Schlesinger*, 418 U.S. at 224 n.14 (emphasis added). That invasion must be "actual," "distinct," "palpable," and "concrete," and not "conjectural" or "hypothetical." *Allen*, 468 U.S. at 750-751, 756, 760 (internal quotation marks omitted). A mere "[a]bstract injury is not enough," *O'Shea* v. *Littleton*, 414 U.S. 488, 494 (1974), because injury-in-fact "is not an ingenious academic exercise in the conceivable * * * [but] requires * * * a factual showing of *perceptible harm*," *Summers* v. *Earth Island Inst.*, 555 U.S. 488, 499

(2009) (emphasis added and internal quotation marks omitted).

The decision below purports to change all that. According to the Ninth Circuit, "alleged violations of [respondent's] statutory rights are sufficient to satisfy the injury-in-fact requirement of Article III." Pet. 8a; see also *id.* at 9a n.3 ("[W]e determine that [respondent] has standing by virtue of the alleged violations of his statutory rights."). Thus, whenever Congress declares that a person who is exposed to an abstract violation of law is entitled to a monetary recovery, that person also has *ipso facto* sustained an injury sufficiently concrete and particularized to have standing to sue in federal court. And because conflating injury-in-fact with injury-in-law effectively removes causation and redressability—as the court of appeals readily admitted, see Pet. App. 9a—the holding below reduces the three-part-standing inquiry to a single-factor test: Constitutional standing exists so long as some statutory remedy can be found. That makes constitutional standing whatever Congress says it is.

But it is not. As this Court put it, "the requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute." *Summers*, 555 U.S. at 497. Indeed, it has long been "settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing." *Raines* v. *Byrd*, 521 U.S. 811, 820 n.3 (1997) (citing *Gladstone, Realtors* v. *Vill. of Bellwood*, 441 U.S. 91, 100 (1979)). After all, a constitutional limit that can be conclusively satisfied by a statutory remedy is no constitutional limit at all. See Roberts, *supra*, 42 DUKE L.J. at 1227 ("a holding

that Congress may override the injury limitation of Article III would [be] remarkable").

As the Petition ably demonstrates, the significance of the Ninth Circuit's error reaches far beyond this particular case. There are dozens of federal laws similar to the one at issue here, all of which could be read to authorize suit by plaintiffs who have suffered no actual, concrete, or particularized injury. See Pet. 16-18. Lower courts are deeply and intractably divided over whether such suits pass constitutional muster. See *id.* at 9-12. The resulting jurisprudential hodge-podge means a suit can be brought to vindicate injuries-in-law under some statutes but not others, and in some courts but not others. See *id.* at 9-12, 18. The need to resolve that confusion alone warrants this Court's review.

But this case is also of great practical significance—particularly to the business community. No matter their size, industry, or geographic location, businesses are subject to all manner of technical legal duties. By the Ninth Circuit's logic, for practical purposes, injury-in-fact (and with it causation and redressability) would no longer be a required element for standing in federal courts. With standing based solely on a technical statutory violation that could be identical for a large swath of potential plaintiffs, the traditional class-certification hurdles of commonality and predominance could be rendered meaningless, as well. As a result, businesses would be significantly more likely to face class actions seeking damages (sometimes annihilating damages) for conduct that caused concrete and particularized harm to only a handful of people or to no one at all—the kind of "frivolous lawsuits" that "essentially force corporate defendants to pay ransom to class attorneys by settling." S. Rep. No. 109-14, at 20 (2005) (Class Action

Fairness Act). This is not idle speculation: Such suits are already being brought, and their pace is accelerating. See Pet. 12-14. This Court's review is necessary to stop these litigious opportunists who have suffered no injury—and the courts that enable them—from playing fast and loose with Article III.

ARGUMENT

I. THE DECISION BELOW TRANSFORMS A TECHNICAL STATUTORY VIOLATION INTO ARTICLE III STANDING

The Ninth Circuit held, in effect, that constitutional standing is whatever Congress says it is. See Pet. App. 6a-9a. Although the class representative here included "sparse" allegations that inaccurate information on Spokeo's website caused him injury, *id.* at 2a, the court of appeals quickly brushed past "whether harm to his employment prospects or related anxiety could be sufficient injuries in fact," *id.* at 9a n.3. The Ninth Circuit chose instead to hold "that [he] has standing by virtue of the alleged violations of his statutory rights" alone. *Ibid.*

But such "injury" does not pass muster under this Court's precedents or the Constitution. A party is not injured by another's mere (alleged) nonobservance of the law. Rather, injury-in-fact results from the *tangible consequences* of another's illegal acts—and here there were none. See, *e.g.*, *Valley Forge Christian Coll.*, 454 U.S. at 485 (holding that a putative plaintiff must identify a "personal injury suffered * * * *as a consequence* of the alleged" violation).

Nevertheless, the Ninth Circuit found respondent's "injury-in-law," without more, sufficient to meet the constitutional requirement of an injury-in-fact.

The court relied in large part on its earlier holding in *Edwards* v. *First American Corp.*, 610 F.3d 514 (9th Cir. 2010), *cert. granted*, 131 S. Ct. 3022 (2011), *cert. dismissed as improvidently granted*, 132 S. Ct. 2536 (2012) (per curiam), Pet. App. 6a, 9a—which itself purported to rely on *Warth* v. *Seldin*, 422 U.S. 490, 500 (1975) (see *Edwards*, 610 F.3d at 517). On the basis of those precedents, the court held that "alleged violations of Robins's statutory rights are sufficient to satisfy the injury-in-fact requirement of Article III." Pet. App. 8a. It added, "[w]hen, as here, the statutory cause of action does not require proof of actual damages, a plaintiff can suffer a violation of the statutory right without suffering actual damages." *Id.* at 7a.

In so holding, the Ninth Circuit applied this Court's standing precedent in a manner that leaves it almost bereft of force. Congress cannot declare that, so long as a plaintiff can state a claim under a statute, he was necessarily injured by the alleged violation of that statute.

This Court has long emphasized the difference between the violation of a statutory right (which does not *ipso facto* confer Article III standing) and the violation of a statutory right that results in a concrete and particularized injury-in-fact (which *can* result in standing). *Compare Sierra Club* v. *Morton*, 405 U.S. 727 (1972), *with Trafficante* v. *Metro. Life Ins. Co.*, 409 U.S. 205, 209 (1972) (noting that "injury in fact to petitioners, the ingredient found missing in *Sierra Club* * * *, is alleged here"). Thus, when the Court in *Warth* observed that "[t]he actual or threatened injury required by Art. III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing," 422 U.S. at 500 (internal quotation marks omitted), it was merely observing that a

statutory violation can precipitate a concrete and particularized injury-in-fact.

The Ninth Circuit paid lip service to cases holding that "the Constitution limits the power of Congress to confer standing." Pet. App. 7a (discussing *Defenders of Wildlife*). It nonetheless went on to hold that a statutory violation can *substitute* for an injury. *Id.* at 8a ("alleged violations of * * * statutory rights are sufficient to satisfy * * * Article III"). As this Court held in *Defenders of Wildlife*, "[s]tatutory broadening of the categories of injury that may be alleged in support of standing is a different matter from abandoning the requirement that the party seeking review must himself have suffered an injury." 504 U.S. at 578 (discussing *Warth*, 422 U.S. at 500) (internal punctuation and quotation marks omitted).

Any power Congress may have to dispense with prudential limitations on standing, or to relax the requirements of redressability and immediacy, does not extend to relaxing the core constitutional requirement that injury-in-fact be concrete and particularized. "In no event * * * may Congress abrogate the Article III minima." *Gladstone, Realtors*, 441 U.S. at 100. Congress can relax constitutional standards only where a plaintiff seeks "to protect his *concrete* interests." *Defenders of Wildlife*, 504 U.S. at 572 n.7 (emphasis added). The Ninth Circuit held that such interest was an observance of the statute itself. See Pet. App. 8a. But a desire to seek "vindication of the rule of law * * * does not suffice" to establish standing. *Steel Co.*, 523 U.S. at 106; see also *Schlesinger*, 418 U.S. at 223 n.13 (denying standing for a claim of "the abstract injury in nonobservance of the Constitution"); *Allen*, 468 U.S. at 754 (same); Roberts, *supra*, 42 DUKE L.J. at 1230.

For that reason, this Court has consistently taken care to identify concrete and particularized interests in support of standing. In *Public Citizen* v. *United States Dep't of Justice*, 491 U.S. 440 (1989), for example, the Court held that plaintiffs had standing to challenge the denial of information sought under the Federal Advisory Committee Act about advice given by the American Bar Association (ABA) to the Department of Justice concerning potential judicial nominees. The Court recognized standing *not* because the statute created a private right of action but because of the "distinct injury" resulting from the Department's "refusal to permit appellants to scrutinize the ABA Committee's activities to the extent FACA allows." *Id.* at 449.

Likewise, in *Federal Election Commission* v. *Akins*, 524 U.S. 11 (1998), the Court required a distinct injury—not just the "injury" that comes from an alleged statutory violation—when it recognized standing for plaintiffs seeking relief under the Federal Election Campaign Act of 1971, which requires certain groups to disclose information about campaign involvement and which creates a private cause of action for "'[a]ny person who believes a violation of th[e] Act * * * has occurred,'" *id.* at 19 (quoting 2 U.S.C. § 437g(a)(1)). As in *Public Citizen*, the Court looked for and found the requisite concrete and particularized injury in the *consequences* of the statutory violation. Indeed, the Court expressly stated that a factual injury was a precondition for standing, see *Akins*, 524 U.S. at 20, and that Congress was simply enabling remediation of that particular injury, see *id.* at 24-25 ("the informational injury at issue here * * * is sufficiently concrete and specific").

The Ninth Circuit's sweeping holding rests on a misunderstanding of Congress's powers to define

standing. Although Congress has the power to "expand standing to the full extent permitted by Art. III," *Gladstone, Realtors*, 441 U.S. at 100 (internal quotation marks omitted), it does *not* have the power to expand standing *beyond* the limits of Article III. The "requirement of injury in fact is a hard floor * * * that cannot be removed by statute." *Summers*, 555 U.S. at 497; see also Jonathan H. Adler, *Standing Still in the Roberts Court*, 59 CASE W. RES. L. REV. 1061, 1063 (2009) ("Congress may tinker on the edges, but it cannot confer standing on parties that fail to meet the underlying constitutional requirements in a given case."). Congress cannot substitute statutory rights for injuries-in-fact that do not exist.

The problems posed by this case strike at the heart of the Constitution's division of powers between the legislature and the judiciary. If, as the Ninth Circuit held, "alleged violations of [a plaintiff's] statutory rights [we]re sufficient to satisfy the injury-in-fact requirement of Article III," Pet. App. 8a—*i.e.*, if injury-in-law could substitute for injury-in-fact—Congress could essentially dictate access to the federal courts by removing the independent force of the case-or-controversy limitation. Without a requirement of an actual injury or a causal connection between that nonexistent injury and the defendant's violation of a legal duty, the existence of a remedy would bootstrap into standing to pursue the remedy in federal court. See, *e.g.*, *id.* at 9a ("When the injury in fact is the violation of a statutory right * * *, causation and redressability will usually be satisfied.") That radical result would sidestep this Court's standing jurisprudence in a substantial category of cases—a category limited in size only by legislative restraint or the limits of legislative ingenuity. That is neither

what the Framers intended nor what the Constitution allows for the exercise of *judicial* power. See Roberts, *supra*, 42 DUKE L.J. at 1232.

The holding below is particularly worthy of review because there was (and is) no need to set the Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681 *et seq.*, on a collision course with Article III. As the Petition explains, see Pet. 22-23; Pet. App. 6a-7a n.2, the Ninth Circuit could have sidestepped the constitutional concerns raised here simply by employing the "well-established principle that statutes will be interpreted to avoid constitutional difficulties," *Frisby* v. *Schultz*, 487 U.S. 474, 483 (1988); accord *Bond* v. *United States*, No. 12-158 (June 2, 2014), slip op. 9. By that principle, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Frisby*, 487 U.S. at 483. It is not hard to find an "otherwise acceptable construction" of the FCRA: As another court of appeals has noted, a "reasonable reading of th[is] statute" is one that would "still require proof of actual damages but simply substitute statutory rather than actual damages for the purpose of calculating the damage award." *Dowell* v. *Wells Fargo Bank, NA*, 517 F.3d 1024, 1026 (8th Cir. 2008) (per curiam).

Congress gave no indication that it wanted to test the boundaries of constitutional standing when it included statutory damages in the FCRA. Courts should not assume that Congress has exercised the full extent of its power to expand standing when it has not said so. See, *e.g.*, *Clark* v. *Martinez*, 543 U.S. 371, 381 (2005) (when "choosing between competing

plausible interpretations of a statutory text," there is a "reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts"). Especially here, where the constitutional problem is as grave as it is, the lower courts need to be reminded that they can and must construe statutes *not* to supplant Article III.

II. THE DECISION BELOW WILL ENCOURAGE ABUSIVE CLASS-ACTION LITIGATION

The Question Presented is not merely of great constitutional significance. It is also of great practical significance. The Petition identifies 18 cases brought under nine different federal statutes, see Pet. 16-18, all of which raise the same question presented by the decision below. The vast majority of those cases—and this one—share another common characteristic, however: They were brought as putative class actions,[2] often seeking damages in the millions, or even billions, of dollars.[3]

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[2] Even some of the cited cases that were not class actions might as well have been. The Plaintiff in *US Fax Law Ctr., Inc.* v. *iHire, Inc.*, 362 F. Supp. 2d 1248 (D. Colo. 2005) (cited at Pet. 16 n.10), for example, is a company that aggregates unwanted faxes from individuals and companies to bring large-scale lawsuits on their behalf "to secure the dollar damages and penalties that are rightfully yours by law" under the Telephone Consumer Protection Act, 47 U.S.C. § 227(b). See http://www.stop-junk-fax-spam.com/services.html (last visited June 3, 2014).

[3] See, *e.g.*, *Beaudry* v. *TeleCheck Servs., Inc.*, 579 F.3d 702, 703-704 (6th Cir. 2009) (cited at Pet. 9) (class representative seeking to represent "hundreds of thousands, if not millions," of Tennessee consumers, each of whom would be entitled to up to $1000—for a total liability in the billions) (internal quotation marks omitted); see also *Trans Union LLC* v. *Fed. Trade*

It is not surprising that the class-action bar has responded to the incentives created by the combination of detailed legislative oversight of business activity and judicial willingness to relax standing requirements. The jettisoning of a meaningful injury-in-fact requirement—and with it a meaningful causation requirement, see Pet. App. 9a ("there is little doubt that a defendant's alleged violation of a statutory provision 'caused' the violation of a right created by that provision")—removes some of the key constraints on class certification. If the only issue that must be proved is an abstract violation of a legal duty, regardless of its widely varying or entirely absent effects on individual class members, then commonality under Fed. R. Civ. P. 23(a)(2) and predominance under Fed. R. Civ. P. 23(b)(3) collapse into a single-issue inquiry.

"Commonality requires the plaintiff to demonstrate that the class members have suffered the same injury." *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541, 2551 (2011) (internal quotation marks omitted). Although this Court has emphasized that "[t]his does not mean merely that they have all suffered a violation of the same provision of law," *ibid.*, any distinction disappears when the Article III injury *is* a violation of the same provision of law.

Predominance—which gets at "whether proposed classes are sufficiently cohesive to warrant adjudication by representation"—"trains on the legal or fac-

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[Footnote continued from previous page]

Comm'n, 536 U.S. 915, 917 (2002) (Kennedy, J., dissenting from denial of cert.) ("Because the FCRA provides for statutory damages of between $100 and $1,000 for each willful violation, petitioner faces potential liability approaching $190 billion.").

tual questions that qualify each class member's case as a genuine controversy." *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 623 (1997). But that test too will almost always be satisfied if a common injury-in-fact exists merely by virtue of common exposure to the same injury-in-law, and without any need ever to consider individualized actual harm or causation.

With the requirements of commonality and predominance effectively relaxed to the point of nonexistence, class certification would often be nearly automatic: An assertion of a generalized injury-in-law would be the beginning and the end of the matter. And the result is perverse. The ease with which a statutory violation can surmount the normal roadblocks of commonality and redressability, for instance, would encourage class counsel to forgo traditional claims based on actual injuries in favor of suits where the only injury common to class members is the defendant's alleged technical violation of a statute. In individual cases, named plaintiffs would have an incentive to waive any claim for actual damages in an attempt to increase their chances of obtaining class certification on their statutory damages claims. Indeed, many have already caught on to this trick. See, *e.g.*, *White* v. *E-Loan, Inc.*, No. C 05-02080, 2006 WL 2411420, at *2 (N.D. Cal. Aug. 18, 2006) (named plaintiff "willing to forego actual damages to seek only statutory damages"). Rather than litigate the alleged statutory violations in the context of the actual individual injuries they might cause, entrepreneurial class-action lawyers deliberately seek to litigate their claims of statutory violations in the abstract in order to increase settlement amounts. The resulting payouts from these no-injury lawsuits amount to deadweight economic loss—a wealth transfer that overcompensates for nonexistent inju-

ries and overdeters insubstantial regulatory violations, leading at best to wasteful expenditures aimed at punctilious compliance with technical statutory requirements.

Unlike respondent's purported injury, the injuries inflicted upon businesses by the non-enforcement of constitutional standing requirements are anything but abstract. Indeed, those injuries are often most pronounced when the defendant did not even violate the statute at issue, or did so in only the most *de minimis* way. *Harris* v. *Experian Info. Solutions, Inc.*, No. 6:06-cv-1808-GRA, Docket No. 201, at *4-7 (D.S.C. June 30, 2009), is instructive. There, the plaintiff class claimed that Experian and other credit reporting agencies violated the FCRA by failing to report consumers' credit limits for their Capital One credit cards—information that Capital One refused to provide to the agencies. The omission of credit-limit information hurt some consumers' credit scores, had no impact on certain others, and *increased* the credit scores of a very substantial third group. *Id.* at *3. Even though the named plaintiff had actually benefited from the alleged violation, he was certified to represent a class of more than four million consumers—which, at $100 to $1000 per violation, sought aggregate statutory damages between $400 million and $4 billion. *Id.* at *5. Although Experian ultimately prevailed on the merits—the Court held that omitting the information at issue did not violate the FCRA—it did so only after expending considerable resources to get to summary judgment (and at the risk of a potentially ruinous adverse judgment). *Id.* at *2.

Similarly, in *Bateman* v. *American Multi-Cinema, Inc.*, 623 F.3d 708 (9th Cir. 2010), which concerned a movie theater chain's alleged violation of

amendments to the FCRA by the Fair and Accurate Credit Transactions Act (FACTA), 15 U.S.C. § 1681c(g) (2005), a putative class of plaintiffs sought up to $290 million for the defendant's inclusion, on electronically printed receipts, of more than the last five digits of the plaintiff class's credit or debit card numbers—even though the class suffered no harm from the practice. The district court denied class certification on the ground that the alleged liability "was enormous and out of proportion to any harm suffered by the class." *Id.* at 710. But the Ninth Circuit reversed—finding that any consideration of those factors was an abuse of discretion. *Id.* at 713-723. Predictably, the case then settled—for nearly $6.5 million, exclusive of attorneys' fees and costs. See *Bateman* v. *Am. Multi-Cinema, Inc.*, No. 2:07-CV-00171-FMC-AJWX, Docket No. 114 at *1 (C.D. Cal. Oct. 11, 2011).

The story is much the same in cases involving the many other statutes cited in the Petition. See Pet. 16-19. In one case concerning the Electronic Communications Privacy Act of 1986 (ECPA), 18 U.S.C. §§ 2510 *et seq.*, (discussed at Pet. 18 n.17), for example, the named plaintiffs claimed on behalf of themselves and a putative nationwide class of millions that one of the defendant's computer programs was unlawfully intercepting users' electronic communications in violation of the ECPA. See *Specht* v. *Netscape Commc'ns Corp.*, 150 F. Supp. 2d 585 (S.D.N.Y. 2001) (describing allegations in the complaint), *aff'd*, 306 F.3d 17 (2d Cir. 2002). Because none of the *Specht* plaintiffs alleged any particular or concrete injury, see *Specht* v. *Netscape Commc'ns Corp.*, Nos. 1:00-CV-4871, *et al.*, 2004 WL 5475796, ¶¶ F, N, Q (S.D.N.Y. Sept. 2, 2004) ("Stipulation of Settlement"), the case rightfully should have been

dismissed at the outset for lack of standing, see, *e.g.*, *Kendall* v. *Employees Ret. Plan of Avon Prods.*, 561 F.3d 112, 121 (2d Cir. 2009) (plaintiffs must "allege some injury or deprivation of a specific right" outside the violation of a "statutory duty").

Instead, it tied up the parties and federal courts for years while class counsel sought statutory damages of $10,000 apiece not only for each of the named plaintiffs, but also for each of the many millions of supposedly identically situated putative class members. See *Specht* v. *Netscape Commc'ns Corp.*, Nos. 1:00-CV-4871, *et al.*, 2000 WL 34500293, ¶¶ 13, 41-54 (S.D.N.Y. Aug. 3, 2000). All told, the litigation cost Netscape several million dollars in discovery and other defense costs before resulting in a class-wide settlement in which plaintiffs and their counsel obtained no money. See Stipulation of Settlement ¶¶ F, N, Q; see also *Specht* v. *Netscape Commc'ns Corp.*, Nos. 1:00-CV-4871, *et al.*, Docket No. 94, at *2 (S.D.N.Y. Apr. 22, 2005) (denying class counsel's motion for attorneys' fees on grounds that settlement did not secure any "quantifiable" benefits for the class), *aff'd sub nom. Weindorf* v. *Netscape Commc'ns Corp.*, 173 F. App'x 44 (2d Cir. 2006).

The Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. § 1692, (discussed at Pet. 16), has been equally ripe for abuse. The parties in *Jerman* v. *Carlisle, McNellie, Rini, Kramer & Ulrich LPA.*, 559 U.S. 573 (2010), for instance, spent years litigating whether the words "in writing" can be included in a debt collector's letter. After this Court remanded the case, the parties filed cross-motions for summary judgment, and the district court held that the plaintiff and the class were entitled to zero actual damages and zero statutory damages. See *Jerman* v. *Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, No. 1:06-

cv-1397, 2011 WL 1434679, at *10-*11 (N.D. Ohio Apr. 14, 2011). Undeterred, plaintiff's counsel filed a motion seeking nearly $350,000 in attorneys' fees and costs, arguing that the action was successful because plaintiff "obtained judgment" on a claim. See *Jerman*, No. 1:06-cv-1397-PAG, Docket No. 62-1, at *3-4 (May 3, 2011). Rather than spending yet more money contesting the matter, defendants finally settled. Notwithstanding the court's prior ruling that the plaintiff class was entitled to nothing, the class received a grand total of $17,000—roughly one-ninth of the class lawyers' take. *Jerman*, No. 1:06-cv-1397-PAG, Docket No. 88-1 (Dec. 13, 2011), at *4.[4]

For companies with many customers or mass-market products, these kinds of suits create a risk of crippling damages for conduct that caused no actual harm.[5] It is no secret that class actions are a "pow-

[4] Countless other, equally egregious examples involving statutes identified in the Petition (at 17-18 & n.17) are easy to find. See, *e.g.*, *In re Facebook Privacy Litig.*, 791 F. Supp. 2d 705, 711-712 (N.D. Cal. 2011) (holding that plaintiffs established standing under Article III by alleging a statutory violation despite a lack of injury in fact, but dismissing case on grounds that allegations did not state a claim under the ECPA); *Taylor* v. *Acxiom Corp.*, 612 F.3d 325, 340 n.15 (5th Cir. 2010) (same result under the Driver's Privacy Protection Act (DPPA), 18 U.S.C. §§ 2721-2725, in a suit alleging trillions of dollars in damages).

[5] In an effort to curtail such frivolous suits, some district courts have refused to certify classes where "even the minimum statutory damages would be enormous and completely out of proportion given the lack of any actual harm." *Evans* v. *U-Haul Co. of Cal.*, No. CV 07-2097-JFW, 2007 WL 7648595, at *4 (C.D. Cal. Aug. 14, 2007) (denying certification of a class seeking statutory damages of up to $1.5 billion). But those rearguard attempts to fix problems caused by lax enforcement of constitutional standing principles are at best unevenly applied and,

erful tool [that] can give a class attorney unbounded leverage." S. Rep. No. 109-14, at 20 (2005) (Class Action Fairness Act). As this Court has repeatedly recognized, "[c]ertification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense." *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 476 (1978); see also *AT&T Mobility LLC* v. *Concepcion*, 131 S. Ct. 1740, 1752 (2011) ("[W]hen damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable. Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims."); *Shady Grove Orthopedic Assocs., P.A.* v. *Allstate Ins. Co.*, 559 U.S. 393, 445 n.3 (2010) (Ginsburg, J., dissenting) ("When representative plaintiffs seek statutory damages, [the] pressure to settle may be heightened because a class action poses the risk of massive liability unmoored to actual injury.").

Although class actions will always "present opportunities for abuse," *Hoffmann-La Roche Inc.* v. *Sperling*, 493 U.S. 165, 171 (1989), the likelihood of abuse is particularly great in cases such as this one, where a plaintiff need not show actual harm. It is important that this Court grant certiorari to preserve the ability to resolve these sorts of baseless

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[Footnote continued from previous page]

worse, increasingly foreclosed as a matter of law. See, *e.g.*, *Murray* v. *GMAC Mortg. Corp.*, 434 F.3d 948, 952-953 (7th Cir. 2006) (foreclosing consideration of the size of statutory damages sought under the FCRA, in a suit seeking up to $1.2 billion in damages).

class actions quickly through challenges to standing. The restoration of proper constitutional standing requirements would deter the plaintiffs' bar from filing such meritless suits in the first place—and spare defendants the enormous costs and settlement pressures that accompany such litigation. Now more than ever, "[i]n an era of frequent litigation [and] class actions * * *, courts must be more careful to insist on the formal rules of standing, not less so." *Ariz. Christian Sch. Tuition Org.* v. *Winn*, 131 S. Ct. 1436, 1449 (2011).

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted.

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AMICUS CURIAE BRIEF

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Supreme Court of the United States

SPOKEO, INC.,

Petitioner,

v.

THOMAS ROBINS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Respondent.

On Petition For Writ Of *Certiorari* To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICUS CURIAE* CONSUMER DATA INDUSTRY ASSOCIATION IN SUPPORT OF PETITIONER

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RULE 29.6 STATEMENT

Pursuant to Rule 29.6, the Consumer Data Industry Association ("CDIA") provides the following disclosure.

CDIA is a trade association. No publicly held company owns 10% or more of CDIA stock.

TABLE OF CONTENTS

Page

RULE 29.6 STATEMENT i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF THE ARGUMENT 4

ARGUMENT 5

I. THE NINTH CIRCUIT ERRED IN CREATING A SINGLE-INQUIRY, NO-HARM, STANDING 5

A. Even where Congress has authorized statutory damages, Robins must allege a distinct and palpable injury 6

B. Robins's injury must be fairly traceable to Spokeo's conduct and redressable by the Court 14

II. THE NINTH CIRCUIT'S DECISION THREATENS CDIA'S MEMBERS WITH CRUSHING LIABILITY THROUGH UNCHECKED CLASS ACTION LITIGATION 15

A. The consumer reporting industry 16

B. The Ninth Circuit's decision encourages unchecked class action litigation 17

C. The facts in this case particularly warrant this Court's consideration of the injury-in-fact issue 19

CONCLUSION 22

TABLE OF AUTHORITIES

Page

CASES

Almendarez-Torres v. United States, 523 U.S. 224 (1998) 10

Amchem Products, Inc. v. Windsor, 521 U.S. 591 (1997) 18

Arizona Christian School Tuition Organization v. Winn, 131 S.Ct. 1436 (2011) 7, 8, 15

AT&T Mobility LLC v. Concepcion, 131 S.Ct. 1740 (2011) 18

Beaudry v. TeleCheck Services, Inc., 579 F.3d 702 (6th Cir. 2009) 9

City of Los Angeles v. Lyons, 461 U.S. 95 (1983) ... 7, 21

Clapper v. Amnesty Int'l USA, 133 S.Ct. 1138 (2013) 20, 21

DaimlerChrysler Corp. v. Cuno, 547 U.S. 332 (2006) 21

Dowell v. Wells Fargo Bank, N.A., 517 F.3d 1024 (8th Cir. 2008) 10

Edwards v. First American Financial Corporation, 610 F.3d 514 (9th Cir. 2010) 6

First American Financial Corporation v. Edwards, 132 S.Ct. 2536 (2012) 6

Golden v. Zwickler, 394 U.S. 103 (1969) 21

Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91 (1979) 11

Heckler v. Chaney, 470 U.S. 821 (1985) 13

TABLE OF AUTHORITIES – Continued

Page

Linda R.S. v. Richard D., 410 U.S. 614 (1973).....8

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).....7, 8, 10, 14

Massachusetts v. EPA, 549 U.S. 497 (2007).....8

Murray v. GMAC Mortgage Corporation, 434 F.3d 948 (7th Cir. 2006) 9, 10, 18

Raines v. Byrd, 521 U.S. 811 (1997).....11

Robins v. Spokeo, Inc., 742 F.3d 409 (9th Cir. 2014).....*passim*

Sarver v. Experian Information Solutions, 390 F.3d 969 (7th Cir. 2004) 2, 3, 16

Sierra Club v. Morton, 405 U.S. 727 (1972) 7

Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26 (1976).....8

Summers v. Earth Island Institute, 129 S.Ct. 1142 (2009).....10

TRW Inc. v. Andrews, 534 U.S. 19 (2001).....16

United States v. Richardson, 418 U.S. 166 (1974).....7

Vermont Agency of Natural Resources v. United States ex rel. Stevens, 529 U.S. 765 (2000).....11, 12

Wal-Mart Stores, Inc. v. Dukes, 131 S.Ct. 2541 (2011).....17

Warth v. Seldin, 422 U.S. 490 (1975).....7, 8, 10

Whitmore v. Arkansas, 495 U.S. 149 (1990).....7, 20

TABLE OF AUTHORITIES – Continued

Page

STATUTES AND REGULATIONS

15 U.S.C. § 1681(a)(1) 16

15 U.S.C. § 1681(a)(2) 16

15 U.S.C. § 1681b 13

15 U.S.C. § 1681e 17

15 U.S.C. § 1681i 17

15 U.S.C. § 1681n ..... *passim*

15 U.S.C. § 1681s 13

OTHER AUTHORITIES

Fed. R. Civ. P. 23. 17

Federal Trade Commission, *Report to Congress Under Sections 318 and 319 of the Fair and Accurate Credit Transactions Act of 2003* (2004) 3, 16

Michael E. Staten and Fred H. Cate, *The Impact of National Credit Reporting Under the Fair Credit Reporting Act: The Risk of New Restrictions and State Regulation* at 28 (May 2003) 2, 16

INTEREST OF *AMICUS CURIAE*

With the consent of all parties,[1] *amicus curiae*, the Consumer Data Industry Association ("CDIA"), submits its brief in support of petitioners, Spokeo, Inc. (*hereinafter*, "Spokeo").

CDIA is an international trade association, founded in 1906, and headquartered in Washington, D.C. As part of its mission to support companies offering consumer information reporting services, CDIA establishes industry standards, provides business and professional education for its members, and produces educational materials for consumers describing consumer credit rights and the role of consumer reporting agencies ("CRAs") in the marketplace. CDIA is the largest trade association of its kind in the world, with a membership of approximately 180 consumer credit and other specialized CRAs operating throughout the United States and the world.

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[1] The parties were timely notified of CDIA's intention to file this brief in accordance with Rule 37.2(a). All parties have consented to the filing of CDIA's *amicus* brief. CDIA's letters requesting consent and the parties' responses have been filed with the Clerk of Court.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

In its more than 100-year history, CDIA has worked with the United States Congress and state legislatures to develop laws and regulations governing the collection, use, maintenance, and dissemination of consumer report information. In this role, CDIA participated in the legislative efforts that led to the enactment of the Fair Credit Reporting Act ("FCRA") in 1970 and its subsequent amendments.

CDIA is vitally interested in the outcome of this appeal because, CDIA's CRA members are subject to the FCRA's comprehensive regulatory scheme and its statutory damages provision, which permits consumers to recover "any actual damages sustained by the consumer as a result of the [willful violation] *or damages of not less than $100 and not more than $1,000*" from those who have willfully failed to comply with the FCRA "with respect to" such consumers.[2]

Because, in the electronic age, any CRA business practice is likely to be repeated millions of times each year (perhaps even millions of times each day),[3] the

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[2] 15 U.S.C. § 1681n(a)(1)(A) (emphasis added).

[3] *See, e.g., Sarver v. Experian Info. Solutions*, 390 F.3d 969, 972 (7th Cir. 2004) (noting that one CRA "processes over 50 million updates to trade information each day"); *see also*, Michael E. Staten and Fred H. Cate, *The Impact of National Credit Reporting Under the Fair Credit Reporting Act: The Risk of New Restrictions and State Regulation* at 28 (May 2003) (the credit reporting system "deals in huge volumes of data – over 2 billion trade line updates, 2 million public record items, an average of 1.2 million household address changes a month,

(Continued on following page)

Article III standing requirements, particularly the injury-in-fact requirement, are critical to CRAs whose activities can be said to be, in the FCRA's language (15 U.S.C. § 1681n) "with respect to" almost any adult U.S. consumer. Article III's limitations are essential to prevent entrepreneurial plaintiffs' class action counsel from abusing the FCRA's statutory damages provision to challenge any CRA activity as a willful violation even when the activity results in no cognizable consumer injury.

Moreover, because the FCRA imposes compliance obligations upon tens of thousands of businesses who furnish information to CRAs,[4] and the users (e.g., creditors, insurers, employers, landlords, and law enforcement) of the billions of consumer reports CRAs prepare every year,[5] the risk of no-injury class action lawsuits, such as Robins's putative class action, could threaten nearly every aspect of the U.S. economy.

Because CDIA has represented the consumer reporting industry for more than a century, and because its member CRAs and their furnishers and

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and over 200 million individual credit files.") available at http://www.ftc.gov/bcp/workshops/infoflows/statements/cate02.pdf.

[4] *See, e.g.*, *Sarver*, 390 F.3d at 972 (noting that a single CRA "gathers information originated by approximately 40,000 sources").

[5] Federal Trade Commission, *Report to Congress Under Sections 318 and 319 of the Fair and Accurate Credit Transactions Act of 2003* at 8-9 (2004) (more than 1.5 billion consumer reports furnished annually) available at http://www.ftc.gov/reports/facta/041209factarpt.pdf.

users are all subject to potential claims under the FCRA's statutory damages provision, CDIA is uniquely qualified to assist this Court as it considers Spokeo's petition.

SUMMARY OF THE ARGUMENT

Left uncorrected, the Ninth Circuit's decision disrupts long-held rules that govern standing and ensure the Article III courts address only true cases or controversies as required by the Constitution. The Court has repeatedly held that Article III standing requires three elements: (1) a concrete injury, (2) caused by the defendant's actions, and (3) that is redressable by the Courts. According to the Ninth Circuit, the tripartite test may now be collapsed into one question in circumstances where Congress has granted plaintiffs the ability to seek statutory damages, as in a case brought under the FCRA. While this Court has recognized that Congress may create enforceable rights that did not previously exist, this Court has never held that Congress may dispose of the requirement that the plaintiff suffer a distinct, palpable injury.

The Ninth Circuit's decision places CDIA's members at great risk. Virtually all aspects of the data that CRAs provide to their customers relate to activities with respect to consumers. Granting consumers standing to sue without any allegation of injury in fact would open the door to ruinous damages to

CDIA's members through unchecked class action litigation. The specific facts of this case present a perfect example of why no-harm class actions are so problematic; Robins's alleged injury concerns inaccurate credit information that likely *bolstered* his credit profile.

Because Robins, as in many class actions seeking statutory damages under the FCRA, has identified no tangible injury to him as a result of the alleged violations, this case presents the appropriate vehicle for the Court to address the issue of whether Article III standing may exist in the absence of any claim of actual harm.

To confirm that Congress may not abrogate by legislative fiat the U.S. Constitution's minimum requirements for judicial standing, this Court should grant Spokeo's petition and decide the important question of whether plaintiffs may satisfy the requirement for Article III standing solely through claims for statutory damages under the FCRA without reference to actual harm.

ARGUMENT

I. THE NINTH CIRCUIT ERRED IN CREATING A SINGLE-INJURY, NO-HARM, STANDING.

The Ninth Circuit's decision suffers from two principal infirmities. First, the court erred in concluding that Robins may satisfy the "injury" requirement

for standing merely by asserting a claim under the statutory damages provision of the FCRA, without reference to actual harm. Second, the court concluded that because Robins's "injury" is a statutory cause of action, the requirements that Robins's injury be caused by Spokeo's conduct and redressable by the court are necessarily satisfied. This Court's long-standing rules regarding access to the judicial system support neither conclusion.

A. Even where Congress has authorized statutory damages, Robins must allege a distinct and palpable injury.

In determining that Robins had standing to pursue his class action lawsuit against Spokeo, the Ninth Circuit erred by holding that Congress may create standing for plaintiffs who suffer no actual injury and seek to recover solely through a statutory damages remedy.[6] This holding represents an unwarranted and unprecedented expansion of standing by making Congress, rather than the judiciary, the gatekeeper to the federal courthouse.

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[6] *Robins v. Spokeo*, 742 F.3d 409, 414 (9th Cir. 2014). This case arises in the same context as *First American Financial Corporation v. Edwards*, 132 S.Ct. 2536 (2012) (cert. dismissed as improvidently granted). This case differs from *Edwards* in that Robins has not alleged that he paid any money to Spokeo. Since *Edwards* was a RESPA case, the plaintiffs' claims arose from the payment of settlement fees. *Edwards v. First American Financial Corp.*, 610 F.3d 514, 516 (9th Cir. 2010). This case presents no such difficulty.

This Court's rules for standing are well-established. "[T]hose who seek to invoke the jurisdiction of the federal courts must satisfy the threshold requirement imposed by Article III of the Constitution by alleging an actual case or controversy."[7] "One of those landmarks, setting apart the 'Cases' and 'Controversies' that are of the justiciable sort referred to in Article III – serving to identify those disputes which are appropriately resolved through the judicial process – is the doctrine of standing."[8] "For the federal courts to decide questions of law arising outside of cases and controversies would be inimical to the Constitution's democratic character. And the resulting conflict between the judicial and the political branches would not, 'in the long run, be beneficial to either.'"[9]

This Court has consistently held that the "irreducible constitutional minimum of standing" consists of three elements: (1) an injury in fact, that is (2) caused by the challenged action of the defendant, and that (3) is redressable in some way by a favorable decision.[10] In requiring a particular injury, this Court

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[7] *City of Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983).

[8] *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (internal citations omitted).

[9] *Arizona Christian School Tuition Org. v. Winn*, 131 S.Ct. 1436, 1442 (2011) (quoting *United States v. Richardson*, 418 U.S. 166 (1974)).

[10] *Lujan*, 504 U.S. at 560 (citing *Warth v. Seldin*, 422 U.S. 490, 508 (1975); *Sierra Club v. Morton*, 405 U.S. 727, 740-41, n. 16 (1972); *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990);

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has emphasized "that the injury must affect the plaintiff in a personal and individual way."[11]

To be sure, Congress may in some circumstances recognize new rights, with the result that an invasion of those rights causes injury and, therefore, permits standing. "[T]he injury required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing.'"[12] Nonetheless, "Art. III's requirement remains: the plaintiff *must still allege a distinct and palpable injury to himself.*"[13]

The Ninth Circuit's *Spokeo* decision ignores this fundamental rule, holding that a mere statutory violation is "injury" enough, "when the statutory cause of action does not require proof of actual damages."[14] Thus, because Congress authorized "damages of not less than $100 and not more than $1,000" against "[a]ny person who willfully fails to comply

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Simon v. Eastern Ky. Welfare Rights Organization, 426 U.S. 26, 41-42 (1976)).

[11] *Arizona Christian*, 131 S.Ct. 1442 (quoting *Lujan*, 504 U.S. at 560, n.1).

[12] *Lujan*, 504 U.S. 579 (citing *Warth v. Seldin*, 422 U.S. 490, 500 (1975), quoting *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973)); *see also Massachusetts v. EPA*, 549 U.S. 497, 516 (2007) ("In exercising this power, however, Congress must at the very least identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit.").

[13] *Warth*, 422 U.S. at 501 (emphasis added).

[14] 742 F.3d at 413.

with"[15] the FCRA, the Ninth Circuit held that Robins had sustained the requisite "injury," as he alleged willful violations of the FCRA.[16]

The Ninth Circuit purported to follow the lead of two other courts of appeals that concluded that section 1681n authorizes a cause of action for statutory damages without the need to show any actual injury.[17] In *Beaudry v. TeleCheck Services, Incorporated*, the Sixth Circuit concluded that, in section 1681n, Congress created a "new legal right," including the right to sue when "the only injury-in-fact involves the violation of that statutory right."[18] Similarly, but in a more attenuated connection to the Ninth Circuit's holding in *Spokeo*, the Seventh Circuit in *Murray v. GMAC Mortgage Corporation*, stated that "the FCRA 'provide[s] for modest damages without proof of injury.'"[19] However, the Seventh Circuit couched this statement in a discussion where it also noted that individual losses would be "small and hard to quantify" and did so without reference to Article III requirements.[20] Regardless of what the

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[15] 15 U.S.C. § 1681n.

[16] 742 F.3d at 413.

[17] *See, e.g., Beaudry v. TeleCheck Servs., Inc.*, 579 F.3d 702 (6th Cir. 2009); *Murray v. GMAC Mortgage Corp.*, 434 F.3d 948 (7th Cir. 2006).

[18] 579 F.3d at 705.

[19] 434 F.3d at 953.

[20] *Id.* At least one other Circuit has recognized that a "reasonable reading" of section 1681n is that the FCRA "require[s] proof of actual damages but simply substitute[s] statutory

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court in *Murray* meant, the Ninth Circuit's *Spokeo* holding builds upon prior decisions from the Sixth and Seventh Circuits that appear to suffer from the same infirmity. *Spokeo* transforms the existence of a remedy (i.e., statutory damages) into the existence of a remedial case or controversy.

This Court's own decisions have never allowed such bootstrapping to establish a justiciable case or controversy. Even where Congress creates a private right of action, "Art. III's requirement remains: the plaintiff must still allege a distinct and palpable injury to himself, even if it is an injury shared by a large class of other possible litigants."[21] This is because, "the requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute."[22] "Congress cannot erase Article III's

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rather than actual damages for the purpose of calculating the damage award." *Dowell v. Wells Fargo Bank, N.A.*, 517 F.3d 1024, 1026 (8th Cir. 2008). CDIA submits that this interpretation of section 1681n should be favored because it avoids any constitutional difficulties. *See Almendarez-Torres v. United States*, 523 U.S. 224, 237 (1998) ("A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score.") (quotations omitted). Under the approach in *Dowell*, statutory damages would be available to plaintiffs who alleged an actual injury, but the damages are hard to quantify.

[21] *Warth*, 422 U.S. at 499.

[22] *Summers v. Earth Island Inst.*, 129 S.Ct. 1142, 1151 (2009); *Lujan*, 504 U.S. at 560 ("[T]he core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III.").

standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing."[23]

CDIA does not deny that, through the FCRA, Congress granted putative plaintiffs a private right of action, including a private right of action for statutory damages based on willful violations. But Congress's creation of a private right of action does not entitle every member of the public who discovers inaccurate credit information access to the federal courts.

This Court addressed this issue in a related context, noting "[a]n interest unrelated to injury in fact is insufficient to give a plaintiff standing."[24] In *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, this Court considered whether a plaintiff suing under the *qui tam* provision of the False Claims Act had standing to assert his claims because the injury alleged in the suit was suffered by the United States. The plaintiff's only interest in the litigation was the "bounty," in the form of a percentage of the United States' recovery he stood to receive if he prevailed in the litigation. The Court firmly rejected the notion that this interest in the suit's outcome sufficed for standing, comparing the

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[23] *Raines v. Byrd*, 521 U.S. 811, 820 n.3 (1997) (citing *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979)).

[24] *Vermont Agency of Natural Resources v. U.S. ex rel. Stevens*, 529 U.S. 765, 772 (2000).

plaintiff's interest to that of "someone who has placed a wager on the outcome."[25]

The *Spokeo* decision would permit what this Court rejected in *Vermont Agency*: "wagering" on the outcome of class action litigation by plaintiffs who have suffered no actual injury. That credit information is reported inaccurately does not create an automatic injury. For example, credit information that bolsters a consumer's credit profile, while inaccurate, causes no harm.[26]

Affording access to the courts in such circumstances is particularly troubling to CDIA's members, because they engage in activities that, in this electronic age, occur millions of times each year or even millions of times each day.[27] Their conduct may occur "with respect to" almost any adult U.S. consumer.[28] Thus, enterprising plaintiffs' counsel who seek to remedy technical violations of the FCRA (at profits to counsels' firms hugely disproportionate to the recovery by each class member, no less) without reference to any actual harm are in the same place as the *qui tam* relator in *Vermont Agency*.[29] This is not to say

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[25] *Id.*

[26] Such is the case with Robins. *See* discussion *infra* at 18-19.

[27] *See* discussion *supra* at 2.

[28] *See* 15 U.S.C. § 1681n.

[29] That Robins lacks standing does not mean that the alleged harms are not subject to any other type of oversight or enforcement. The FCRA provides for its administrative

(Continued on following page)

that there are no circumstances in which a violation of the FCRA *would* create a cognizable injury. For example, providing a credit report without a permissible purpose represents a circumstance where Congress has created an actionable injury where none otherwise existed.[30] In that case, a consumer's privacy rights are injured when credit reports are provided without a permissible purpose.

But a plaintiff who seeks to vindicate the violation of a statutory right, without more, becomes a

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enforcement by the Federal Trade Commission, the Consumer Financial Protection Bureau, the federal banking agencies, and state Attorneys General. 15 U.S.C. § 1681s. Each of these enforcement authorities may vindicate the public interest in seeing that the FCRA's provisions are obeyed. Even when no individual has been injured, governmental authorities charged with enforcement of the law, always have an interest in seeing that the laws are obeyed. *Heckler v. Chaney*, 470 U.S. 821, 831-832 (1985) (" . . an agency decision . . often involves a complicated balancing of a number of factors which are peculiarly within its expertise. . . . Thus, the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all. An agency generally cannot act against each technical violation of the statute it is charged with enforcing. The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities."). CDIA submits that administrative enforcement actions advance statutory purposes without exceeding the courts' traditional and proper Article III role of vindicating individual rights and remedying individual injuries.

[30] *See* 15 U.S.C. § 1681b.

private attorney-general, seeking to vindicate an undifferentiated public interest in CRAs' compliance with the FCRA.[31] Article III must have a more concrete limitation. Robins must allege a distinct and palpable injury.

B. Robins's injury must be fairly traceable to Spokeo's conduct and redressable by the Court.

Having incorrectly concluded that alleging a willful violation of the FCRA is sufficient to satisfy the injury-in-fact element of standing, the Ninth Circuit also found that the statutory injury, by itself also satisfied the "causation" and "redressability" requirements of standing, because "[w]hen the injury in fact is the violation of a statutory right causation and redressability will usually be satisfied."[32]

Therefore, under the Ninth Circuit's rationale, the formerly three-part standing inquiry now consists of a single question: Did the plaintiff allege a violation of a legal right that affords a private cause of action? If the answer is yes, then the plaintiff has standing to pursue a legal remedy through the courts

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[31] *See Lujan*, 504 U.S. at 576-577 (Congress cannot convert "public interest in proper administration of the laws" into an "'individual right' vindicable in the courts").

[32] *Spokeo*, 742 F.3d 409, 414 (9th Cir. 2014).

on his (or a class's) behalf.[33] Plainly, Article III requires more. An "injury," by itself is not enough to provide access to federal courts.[34] Yet the Ninth Circuit's interpretation of the injury requirement dictates a result where causation and redressability are established automatically. That this approach obviates two-thirds of the traditional standing test suggests grave infirmities with the Ninth Circuit's rule.

II. THE NINTH CIRCUIT'S DECISION THREATENS CDIA'S MEMBERS WITH CRUSHING LIABILITY THROUGH UNCHECKED CLASS ACTION LITIGATION.

CDIA's members' business practices are subject to the FCRA and may involve millions of consumers each day, touching every aspect of the economy. By affording standing to plaintiffs who have not suffered any harm, the Ninth Circuit's decision, creates the possibility that CDIA's members, their data furnishers and their customers will be subject to ruinous damages through class action lawsuits.

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[33] Although Robins alleged that Spokeo had harmed his employment prospects and caused him emotional distress through maintaining inaccurate information about him on the internet, the Ninth Circuit declined to reach those allegations because it determined that a violation of the FCRA alone was sufficient to satisfy standing requirements. *Spokeo*, 742 F.3d at 414 n.4.

[34] *See Arizona Christian*, 131 S.Ct. at 1442.

A. The consumer reporting industry.

Congress recognizes that the consumer reporting industry is vital to the U.S. economy.[35] Each year, CRAs furnish more than 1.5 billion consumer reports to creditors, insurers, employers, landlords, law enforcement and counter-terrorist agencies, all of which use this information to make important risk-based decisions, hire employees, evaluate the backgrounds of potential tenants, and locate individuals suspected of criminal activity.[36]

In order to prepare these reports, CRAs have created and maintain data files on nearly 200 million consumers.[37] The files contain 2.6 billion tradelines (an industry term for accounts that are included in a credit report)[38] that include billions of items of

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[35] 15 U.S.C. § 1681(a)(1) ("The banking system is dependent upon fair and accurate credit reporting."); 15 U.S.C. § 1681(a)(2) (the consumer reporting system is an "elaborate mechanism" for investigating and evaluating a consumer's credit worthiness, credit standing, credit capacity, character, and general reputation); *TRW Inc. v. Andrews*, 534 U.S. 19, 23 (2001) ("Congress enacted the FCRA in 1970 to promote efficiency in the Nation's banking system and to protect consumer privacy.").

[36] *Id.*; *Sarver v. Experian Info. Solutions*, 390 F.3d 969, 972 (7th Cir. 2004); Michael E. Staten and Fred H. Cate, *The Impact of National Credit Reporting Under the Fair Credit Reporting Act: The Risk of New Restrictions and State Regulation* at vi (May 2003).

[37] Federal Trade Commission, *Report to Congress Under Sections 318 and 319 of the Fair and Accurate Credit Transactions Act of 2003* (2004) at 8-9.

[38] *Id.* at 8-9.

information the CRAs receive from tens-of-thousands of furnishers on a monthly basis.[39]

B. The Ninth Circuit's decision encourages unchecked class action litigation.

Because CRAs produce more than 1.5 billion consumer reports each year, it is not surprising that they are sued hundreds of times each year by consumers alleging violations of the FCRA. Typical lawsuits include claims that the CRAs failed to follow "reasonable procedures" to assure the "maximum possible accuracy" of the information used to prepare consumer reports concerning the plaintiffs,[40] or that the CRAs failed to conduct reasonable investigations following the receipt of consumer disputes concerning the accuracy or completeness of the information in the CRA's files relating to the plaintiffs.[41]

Recasting standing as a one-part inquiry that does not require actual injury removes some of the principal constraints to class certification, namely commonality and predominance.[42] "Commonality requires the plaintiff to demonstrate that the class members have suffered the same injury."[43] Predominance

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[39] *Id.*

[40] 15 U.S.C. § 1681e(b).

[41] 15 U.S.C. § 1681i(a).

[42] *See* Fed. R. Civ. P. 23.

[43] *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 2551 (2011) (internal quotation marks omitted).

"tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation."[44] Where an entire class asserts willful violations of the FCRA and requests relief in the form of statutory damages, commonality and predominance pose little resistance to class certification.[45]

Opening the door for no-harm plaintiffs to pursue class actions creates a high risk of *in terrorem* settlements.[46] CDIA's members maintain or furnish credit information on millions of consumers. With statutory damages as much as $1,000 per violation under section 1681n and no limit on total class recovery, a CRA's potential monetary exposure could reach into the billions, thus increasing the likelihood that CDIA's members will be forced to settle questionable claims solely because they risk catastrophic liability.[47]

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[44] *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 623 (1997).

[45] *Cf. Murray*, 434 F.3d at 953 (Where consumers must allege individual harm "[c]ommon questions no longer would predominate, and an effort to determine a million consumers' individual losses would make the suit unmanageable.").

[46] *See AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740, 1752 (2011) ("Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims").

[47] *Id.*

C. The facts in this case particularly warrant this Court's consideration of the injury-in-fact issue.

With the potential for untold statutory damages in mind, consider the alleged facts in this case. Robins is a putative class-action plaintiff who claims that Spokeo reported inaccurate credit information identifying him as *more* educated than in actuality, in a better employment circumstance, and married rather than single.[48] That the allegedly inaccurate information likely bolstered Robins's credit profile rather than damaged it shows the absurdity of affording standing to class action plaintiffs without reference to actual harm.

Moreover, Robins's actual allegations of harm, which the Ninth Circuit expressly declined to address in its decision,[49] further underscore the inherent conflict between affording standing to no-harm plaintiffs and Article III's requirements. Robins claims that the inaccurate information about him contained on Spokeo's website, although it likely bolstered his credit profile, damaged his "prospects" for employment and caused him anxiety and stress.[50] But Robins points to no employer who actually denied his job application, much less an employer who denied his job application based on information reported by Spokeo. In fact, Robins does not identify any actual or

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[48] *See* Complaint at 31-33.

[49] 742 F.3d at 414 n.4.

[50] First Amended Complaint at ¶¶ 35-37.

imminent adverse action from an employer; the alleged harm to his employment "prospects" is entirely forward-looking, a presumption that someday, somehow, an employer will use inaccurate information housed at Spokeo to harm him.

The Court recently held that similarly-situated plaintiffs lacked standing where the plaintiffs' theory of standing "reli[ed] on a highly attenuated chain of possibilities."[51] In *Clapper v. Amnesty International USA*, the plaintiffs based their claim for standing on a presupposition that the Government would at some point in the future conduct illegal international surveillance against the plaintiffs' international contacts.[52] Yet, the plaintiffs could not identify any specific person against whom the federal government might conduct illegal surveillance, nor could they demonstrate that the specific statute at issue would be the vehicle for the supposed illegal surveillance.[53]

Robins is similarly situated in this case because his allegations of harm depend on the occurrence of future events that are neither imminent nor particularized.[54] Indeed, Robins's injury may only be characterized as a "highly speculative fear" that, at some

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[51] *Clapper v. Amnesty International USA*, 133 S.Ct. 1138, 1148 (2013).

[52] *Id.* at 1143-44.

[53] *Id.* at 1148-49.

[54] *See id.* at 1147 (citing *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990) ("A threatened injury must be certainly impending to constitute injury in fact.") (internal quotations omitted)).

point in the future, his career will suffer because Spokeo provided inaccurate information about him.[55] This Court's prior decisions demonstrate that this type of highly-attenuated injury does not satisfy Article III's requirements.[56]

The Court should grant Spokeo's petition for review and clarify that no-harm plaintiffs are not entitled to access federal courts solely in the pursuit of ruinous monetary damages from CDIA's members under the FCRA.

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[55] *Clapper*, 133 S.Ct. at 1147.

[56] *See, e.g.*, *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 343-344 (2006) (no case or controversy where taxpayers alleged that a tax credit to Chrysler would deplete state treasury in the future and cause a disproportionate tax burden on citizens); *City of Los Angeles v. Lyons*, 461 U.S. 103, 105 (1983) (no case or controversy where injury allegations depended on excessive police force occurring at some point in the future); *Golden v. Zwickler*, 394 U.S. 103, 109 (1969) (no standing where harm depended on the future candidacy of a former congressman).

CONCLUSION

For the reasons set forth above, Spokeo's petition for writ of certiorari should be granted to permit this Court to review and correct the Ninth Circuit's decision.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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In the Supreme Court of the United States

SPOKEO, INC.,

Petitioner,

v.

THOMAS ROBINS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF DRI - THE VOICE OF THE DEFENSE BAR AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

INDEX OF AUTHORITIES iii

STATEMENT OF INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 4

ARGUMENT 8

This Case Presents The Court With An Opportunity To Resolve Conflicting Circuit Decisions And Clarify That The Actual Injury Requirement Of Article III, Applied In The Context Of The Fair Credit Reporting Act And Other Federal Statutes Granting Statutory Causes Of Action, Requires A Plaintiff To Satisfy The Constitutional Standing Requirement. 8

A. The doctrine of standing is essential to maintaining the equilibrium between the separate but overlapping branches of government embodied in our federal Constitution and must apply to all suits brought pursuant to federal statutes conferring private rights of action – like the Fair Credit Reporting Act. 8

B. The Court's review is needed to resolve a circuit conflict exacerbated by the Ninth Circuit's decision in this case- and engender uniformity on the issue of whether a statutory violation, unaccompanied by any actual injury, is sufficient to establish Article III standing. 11

C. Absent review and clarification by this Court, the relaxed standing requirement adopted by the Ninth Circuit will encourage needless litigation, dramatically increase costs for businesses and individuals, and encourage forum shopping. 16

CONCLUSION 20

INDEX OF AUTHORITIES

CASES **Page(s)**

Aldens, Inc. v. Miller,
610 F.2d 538 (8th Cir. 1979) 12

Allee v. Medrano,
416 U.S. 802 (1974) 5

Allen v. Wright,
468 U.S. 737 (1984) 4, 9

Alston v. Countrywide Financial Corp.,
585 F.3d 753 (3d Cir. 2009) 13

Alternative Sys. Concepts, Inc. v. Synopsys Inc.,
374 F.3d 23 (1st Cir. 2004) 12

City of Los Angeles v. Lyons,
461 U.S. 95 (1983) 10

Beaudry v. TeleCheck Services, Inc.,
579 F.3d 702 (6th Cir. 2009) 6, 12

Bowsher v. Synar,
478 U.S. 714 (1986) 8

DaimlerChrysler Corp. v. Cuno,
547 U.S. 332 (2006) 10

David v. Alphin,
704 F.3d 327 (4th Cir. 2013) 5, 6, 13

Deposit Guaranty Nat. Bank, Jackson, Miss. v. Roper,
445 U.S. 326 (1980) 19

Edwards v. First Am. Corp.,
610 F.3d 514 (9th Cir. 2010) 5, 14

Fair Housing Council of Suburban Philadelphia v. Main Line Times,
141 F.3d 439 (3d Cir. 1998) 6, 13

First Am. Fin. v. Edwards,
567 U.S. ---,--- ,132 S.Ct. 2356 (2012) 14

Friends of the Earth, Inc. v. Laidlaw Environmental Services,
528 U.S. 167 (2000) 9, 10

Gambardella v. G. Fox & Co.,
716 F.2d 104 (2d Cir. 1983) 16

Hein v. Freedom from Religion Foundation, Inc.,
551 U.S. 587 (2007) 4, 9

Joint Stock Soc'y v. UDV North America, Inc.,
266 F.3d 164 (3d Cir. 2001) 6, 13

Kelton Arms Condo. Owners Ass'n v. Homestead Ins. Co.,
346 F.3d 1190 (9th Cir. 2003) 12

Kendall v. Employees Retirement Plan of Avon Prods.,
561 F.3d 112 (2d Cir. 2009) 6, 12

Lexmark Intern., Inc. v. Static Control Components, Inc.,
134 S.Ct. 1377 (2014) 6

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992) 5, 9

Matter of Rhone-Poulenc Rorer, Inc.,
51 F.3d 1293 (7th Cir. 1995) 18

Mistretta v. U.S.,
488 U.S. 361 (1989) 8

Murray v. GMAC Mortgage Corp.,
434 F.3d 948 (7th Cir. 2006) 6, 13

Owen Equipment & Erection Co. v. Kroger,
437 U.S. 365 (1978) 4

Piper Aircraft Co v. Reyno,
454 U.S. 235 (1981) 19

Purtle v. Eldridge Auto Sales, Inc.,
91 F.3d 797 (6th Cir. 1996) 16

Robins v. Spokeo,
742 F.3d 409 (9th Cir. 2014) *passim*

Sierra Club v. Morton,
405 U.S. 727 (1972) 5

Summers v. Earth Island Institute,
129 S.Ct. 1142 (2009) 9

Thorogood v. Sears, Roebuck and Co.,
547 F.3d 42 (7th Cir. 2008) 18

Wagner v. Pennwest Farm Credit, ACA,
109 F.3d 909 (3rd Cir. 1997) 12

Wallace v. ConAgra Foods, Inc.,
--- F.3d ---, 2014 WL 1356860 (8th Cir. 2014) 14

Youngstown Sheet & Tube Co v. Sawyer,
343 U.S. 579 (1952) 8

CONSTITUTION AND STATUTES

12 U.S.C. § 2607 (Real Estate Settlement Procedures Act of 1974) 16

§ 2607(d)(2) 13

12 U.S.C. § 4907 (Homeowners Protection Law) 17

15 U.S.C. § 1051, *et seq.* (Lanham Act) 13

15 U.S.C. § 1640 (The Truth in Lending Act) 16

15 U.S.C. § 1681, *et seq.* (Fair Credit Reporting Act) *passim*

15 U.S.C. § 1692 (Fair Debt Collection Practices Act) 16

15 U.S.C. § 1693m(a)(2) (Electronic Funds Transfer Act) 16, 17

29 U.S.C. § 1854 (Migrant and Seasonal Agricultural Worker Protection Act) 16

47 U.S.C. § 227(3) (Telephone Consumer Protection Act) 16

U.S. Const., art. I, § 1 8

U.S. Const., art. II, § 2 8

U.S. Const., art. III *passim*

U.S. Const., art. III, § 1 8

U.S. Const., art. III, § 2 9

U.S. Const., art. III, § 2, cl. 1 4

RULES

Fed. R. Civ. P 23 17

Sup. Ct. R. 10(a) 12

Sup. Ct. R. 37.2(a) 1

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Sheila B. Scheuerman, *Due Process Forgotten: The Problem of Statutory Damages and Class Actions*, 74 Mo. L. Rev. 103 (Winter 2009) 18

STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae DRI – the Voice of the Defense Bar, is a 22,500-member international association of defense lawyers who represent individuals, corporations, insurance carriers, and local governments involved in civil litigation. DRI is committed to enhancing the skills, effectiveness, and professionalism of defense lawyers around the globe. A primary part of DRI's mission is to make the civil justice system more fair, efficient, and consistent. See http://www.dri.org/About. To that end, DRI participates as amicus curiae in cases that raise issues of importance to its membership and to the judicial system. This is such a case.

DRI's interest in this case stems from its members' extensive involvement in civil litigation. DRI's members are regularly called upon to defend their clients in lawsuits brought merely to pursue public policies rather than to seek redress for a distinct and personalized injury. Left unreviewed by this Court, the Ninth Circuit's decision in this case will have a profound effect on businesses and individuals who may be subject to suits brought under the Fair Credit Reporting Act, 15 U.S.C. § 1681, *et seq.*, and other federal and state statutes providing for statutory

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[1] Pursuant to Supreme Court Rule 37.6, amicus curiae states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from amicus curiae, its members, and its counsel, made any monetary contribution towards the preparation and submission of this brief. Pursuant to Supreme Court Rule 37.2(a), amicus curiae certifies that counsel of record for both petitioner and respondent have, after timely notification, consented to this filing in letters on file with the Clerk's office.

damages because it broadens the doctrine of standing to allow the judiciary to resolve disputes in the absence of an actual injury. The Ninth Circuit's decision, which exacerbates an already-existing circuit split, would encourage the filing of lawsuits by non-injured plaintiffs. DRI has a strong interest in assuring that the many federal and state statutes which confer a statutory cause of action do not provide a "back door" for uninjured litigants to obtain relief in federal court. The Ninth Circuit's alteration of the standing doctrine opens the floodgates of litigation in derogation of the Framers' intent to limit the jurisdiction of the judicial branch to "cases" and "controversies." This, in turn, directly affects the fair, efficient, and consistent functioning of our civil justice system and, as such, is of vital interest to the members of DRI.

The ability of plaintiffs to circumvent Article III's standing requirement and proceed in class action and other litigation absent actual injury presents an ongoing point of concern for DRI's members. The issue of standing and its outer limits is frequently studied and discussed by DRI's membership in a variety of contexts. *See, e.g.*, Nora Coleman, et. al., *Stopped Before They Start: Dismissing No-Injury Class Actions*, DRI For Def. 42 (December 2010) (providing strategies for attacking standing in no-injury class actions); Brian A. Bender, et. al., *A Gathering Storm: New Developments in Climate Change Litigation*, DRI for Def. 50 (January 2010) (discussing noteworthy decisions involving proprietary standing and parens patriae standing); Jeffrey A. Holmstrand, *Statutory Consumer Fraud Act Claims: Enforcing the Reliance Requirement*, DRI For Def. 43 (October 2010) (recognizing the exponentially-broadened exposure a

defendant faces as a result of statutory consumer fraud act claims brought on behalf of large numbers of people, many or most of whom did not sustain any actual injury). DRI therefore has a unique vantage point to help this Court understand the importance of proper interpretation of federal statutory damages statutes in light of the constitutionally-mandated standing requirements, not only from a legal standpoint, but also from practical and economic standpoints as well. Based on its members' extensive practical experience, DRI is uniquely suited to explain why this Court should review and ultimately reverse the Ninth Circuit's decision in this case.

Both the bench and the bar need guidance regarding the outer limits of Article III's standing requirement. The current lack of clarity in the law of standing, as exemplified by conflicting circuit decisions, may lead federal courts to inappropriately exercise power beyond the scope authorized by Article III. DRI has a strong interest in assuring that a uniform rule is adopted which recognizes Congress's right to create statutory causes of action while safeguarding the constitutionally-mandated requirement to establish standing for everyone on whose behalf a claim is presented for litigation in federal court.

Left intact by this Court, the Ninth Circuit's decision will have a profound effect on defendants who may be subject to litigation and ultimately forced to pay high-dollar judgments, even in situations where the plaintiff has suffered no harm. This creates the potential for widespread abuse of statutory damages statutes in a way not intended by the Legislature. As such, this case is of vital interest to DRI.

SUMMARY OF ARGUMENT

The United States Constitution mandates that all persons presenting a claim for litigation in federal court have an actual "Case" or "Controversy" to invoke the power of the federal courts. U.S. Constitution, Article III, Section 2, Clause 1. Article III forms the underpinnings of a constitutionally-required standing doctrine that cannot be abrogated by statutory language purportedly entitling any person to sue. *Allen v. Wright*, 468 U.S. 737, 750-51 (1984). Thus, the Legislature cannot confer standing on any person in the absence of a showing that the person satisfies the constitutional test for standing. That test requires the plaintiff to allege "personal injury fairly traceable to the defendant's allegedly unlawful conduct" that is "likely to be redressed by the requested relief." *Hein v. Freedom from Religion Foundation, Inc.*, 551 U.S. 587, 598 (2007), quoting *Allen v. Wright*, *supra*, at 751. This test comports with the longstanding precept that federal courts are courts of limited jurisdiction. *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 274 (1978).

The Ninth Circuit's decision in *Robins v. Spokeo*, 742 F.3d 409 (9th Cir. 2014), marks a radical departure from the constitutional mandate that all persons presenting a claim for litigation in federal court satisfy Article III standing. In reviewing the uninjured plaintiff's claim brought under the Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681 *et seq.*, the Ninth Circuit held that the "creation of a private cause of action to enforce a statutory provision implies that Congress intended the enforceable provision to create a statutory right," and that "the violation of a statutory

right is usually a sufficient injury in fact to confer standing." 742 F.3d at 412, citing *Edwards v. First Am. Corp.*, 610 F.3d 514, 517 (9th Cir. 2010). Turning the three-part test for Article III standing into a single-factor inquiry satisfied by the availability of a statutory remedy contradicts this Court's precedents and represents a grave misunderstanding of the standing doctrine mandated by Article III's limitation on the judiciary's power to only "cases" or "controversies." As this Court observed in *Lujan v. Defenders of Wildlife*, "[Statutory] broadening [of] the categories of injury that may be alleged in support of standing is a different matter from abandoning the requirement that the party seeking review must himself have suffered an injury." 504 U.S. 555, 578 (1992), quoting *Sierra Club v. Morton*, 405 U.S. 727, 738 (1972). By holding that a plaintiff bringing suit under the FCRA satisfies Article III's injury-in-fact requirement by virtue of the bare statutory violation – here the transmission of allegedly inaccurate personal information – the Ninth Circuit's decision enables individuals who have suffered no "actual injury" to enter federal courts through the "back door", a practice which this Court has expressly disapproved. *Allee v. Medrano*, 416 U.S. 802, 828-29 (1974) (Burger, C.J., concurring).

Now is the time for the Court to rule on this significant issue. The federal circuits that have addressed this standing issue in the context of various federal statutes providing statutory damages have reached inconsistent results. In *David v. Alphin*, 704 F.3d 327, 338 (4th Cir. 2013), the Fourth Circuit held, and DRI submits correctly so, that a theory of Article III standing based solely on the deprivation of a statutory right "is a non-starter as it conflates

statutory standing with constitutional standing." Accordingly, the Fourth Circuit affirmed the district court's decision that it did not have jurisdiction over plaintiffs' ERISA claims absent "both statutory *and* constitutional standing." (*Id.*). See also *Lexmark Intern., Inc. v. Static Control Components, Inc.*, 134 S.Ct. 1377, 1388, n. 4 (2014) (discussing "statutory standing"). The Second and Third Circuits have similarly recognized the importance of strict adherence to the constitutional standing requirement even in the context of federal statutes providing statutory damages. See *Kendall v. Employees Retirement Plan of Avon Prods.*, 561 F.3d 112, 121 (2d Cir. 2009); *Joint Stock Soc'y v. UDV North America, Inc.*, 266 F.3d 164, 176 (3d Cir. 2001) (Alito, J.); *Fair Housing Council of Suburban Philadelphia v. Main Line Times*, 141 F.3d 439, 443-44 (3d Cir. 1998). But the Ninth Circuit reached the opposite conclusion (Pet. App. 1a), in part by looking to the Sixth Circuit, which has allowed claims brought under the FCRA to proceed absent proof of injury. *Beaudry v. TeleCheck Services, Inc.*, 579 F.3d 702, 705-07 (6th Cir. 2009). See also *Murray v. GMAC Mortgage Corp.*, 434 F.3d 948, 952-53 (7th Cir. 2006). These conflicting decisions leave both bench and bar with no clear directive on whether Congress can create constitutional standing. This Court should therefore grant review to resolve the disagreement among the circuits and provide guidance on whether a suit brought under the Fair Credit Reporting Act or other similar statutes relieves plaintiffs from satisfying Article III's standing requirement. Indeed, given the number of federal and state statutes providing for statutory damages, the implications of the Ninth Circuit's decision will reach well beyond this case and the Fair Credit Reporting Act.

Failure to address and reverse the Ninth Circuit's decision will not only provide a vehicle for individuals with no actual injury to seek and possibly obtain relief, it will also result in the increase of costly litigation against businesses and individuals that was not intended by the Framers of the United States Constitution. Additionally, the Ninth Circuit's decision to excuse plaintiffs from showing Article III injury-in-fact undermines class certification standards and thereby encourages forum shopping. DRI believes that preserving the Legislature's right to create a statutory cause of action while simultaneously requiring a plaintiff to allege actual injury will safeguard the constitutionally-derived balance of powers between and among the three branches of government, by maintaining the longstanding doctrine of standing, which is an indispensable element in our separation of powers.

ARGUMENT

This Case Presents The Court With An Opportunity To Resolve Conflicting Circuit Decisions And Clarify That The Actual Injury Requirement Of Article III, Applied In The Context Of The Fair Credit Reporting Act And Other Federal Statutes Granting Statutory Causes Of Action, Requires A Plaintiff To Satisfy The Constitutional Standing Requirement.

A. The doctrine of standing is essential to maintaining the equilibrium between the separate but overlapping branches of government embodied in our federal Constitution and must apply to all suits brought pursuant to federal statutes conferring private rights of action – like the Fair Credit Reporting Act.

The United States Constitution establishes three distinct branches of government and grants to each the responsibility for exercising one of the three major types of governmental power. U.S. Const., art. I, § 1; art. II, § 2; art. III, § 1. This separation of powers was not intended to make each branch completely autonomous or result in a "hermetic division" of the branches, but rather to create separate but overlapping branches. *Bowsher v. Synar*, 478 U.S. 714, 748-49 (1986); *Mistretta v. U.S.*, 488 U.S. 361, 381 (1989); *Youngstown Sheet & Tube Co v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring). One of the safeguards developed to preserve this carefully-crafted balance is the doctrine of standing. The doctrine assures that the "courts exercise power only in the last

resort, and as a necessity, and only when adjudication is consistent with a system of separated powers and [the dispute is one] traditionally thought to be capable of resolution through the judicial process." John G. Roberts, *Article III Limits On Statutory Standing*, 42 Duke L. J. 1219, 1223-1224 (1993), quoting *Allen v. Wright*, 468 U.S. 737, 750-51 (1984). This case falls at the heart of the limits on the judiciary's exercise of legislative power and presents the Court with the opportunity to clarify the standing doctrine as it applies to the Fair Credit Reporting Act and the Legislature's right to confer standing on a litigant.

Constitutional standing, a threshold requirement to any suit in federal court, is derived from Article III's limitation of the judicial power of the United States to the resolution of "Cases" and "Controversies." U.S. Constitution, art III, § 2; *Hein v. Freedom From Religion Foundation, Inc.*, 551 U.S. 587, 598 (2007); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *Friends of the Earth, Inc. v. Laidlaw Environmental Services*, 528 U.S. 167 (2000). It has been said that Article III requires a live contest in which to test legal differences. Felix Frankfurter, *A Note on Advisory Opinions*, 37 Harv. L. R. 1002, 1006 (1924). The issue of standing depends upon whether the party has alleged such a personal stake in the outcome of the controversy as to ensure that the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution. Stated otherwise, it is incumbent upon a party to demonstrate more than just a commitment to vigorous advocacy. *Lujan, supra,* at 559-560. See also *Summers v. Earth Island Institute*, 129 S.Ct. 1142, 1148-49 (2009).

Those who seek to invoke the jurisdiction of the federal courts must therefore satisfy the threshold standing requirement imposed by Article III. *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983). That means a plaintiff must demonstrate "a personal stake in the outcome" in order to assure the presence of that concrete adverseness which sharpens the presentation of issues necessary for the proper resolution of constitutional questions. (*Id.* at 101). Under such an approach, abstract injury is not enough. (*Id.*). A plaintiff must show that she sustained or is immediately in danger of sustaining some direct injury as a result of the challenged official conduct and the injury or threat of injury must be both real and immediate, not conjectural or hypothetical. (*Id.* at 102). The plaintiff must also demonstrate that the injury will likely be redressed by a favorable decision. *Friends of the Earth, Inc. v. Laidlaw Environmental Services*, *supra*, at 180-81.

The standing doctrine is a critical element of the separation-of-powers principle and the separation of powers is a fundamental method of protecting liberty. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 340-342 (2006). Under the doctrine of the separation of powers, each branch of government has powers that belong to it and cannot be transferred to another branch of government. The doctrine of standing recognizes and honors those bounds.

When a court encroaches on Article III's standing requirement by permitting a suit to proceed based on a bare statutory violation – even though the plaintiff does not have an actual injury, on the theory that the statutory violation alone confers standing, it strips

Article III of its power. That is exactly what the Ninth Circuit did in this case when it held that standing is demonstrated whenever there is a "violation of a statutory right[.]" 742 F.3d at 412. This holding not only undermines respect for the law, and particularly, our federal Constitution, it also renders it difficult for DRI's members to adequately represent their clients' interests. As a result of the Ninth Circuit's decision, DRI's members are unable to predict with any accuracy the outcome of suits brought by uninjured plaintiffs under the FCRA and other similar no-harm statutes. The current circuit split further exacerbates this problem.

B. The Court's review is needed to resolve a circuit conflict exacerbated by the Ninth Circuit's decision in this case- and engender uniformity on the issue of whether a statutory violation, unaccompanied by any actual injury, is sufficient to establish Article III standing.

This Court has long sought to achieve uniform pronouncements of federal law. "Both the Constitution's framers and the Supreme Court have stressed that the articulation of nationally uniform interpretations of federal law is an important objective of the federal adjudicatory process." Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmakng*, 73 Tex. L. Rev. 1, 38 (November 1994). Uniformity serves several "laudable goals," including "ensuring the predictability of legal obligations," garnering respect for judicial authority, and ensuring that "similarly situated litigants are treated equally." (*Id.* at 38-39).

Given the desire for uniformity among the circuits, a decision of a circuit that "conflict[s] with the decision of another United States court of appeals on the same important matter" is deemed, for purposes of review on a writ of certiorari, a compelling consideration. See Supreme Court Rule 10(a). And many appellate circuits, including the Ninth Circuit, have expressly recognized the importance of ruling consistent with sister circuits on issues of federal law, viewing deviations from past decisions a last resort to be avoided. See, e.g., *Kelton Arms Condo. Owners Ass'n v. Homestead Ins. Co.*, 346 F.3d 1190, 1192 (9th Cir. 2003); *Aldens, Inc. v. Miller*, 610 F.2d 538, 541 (8th Cir. 1979); *Alternative Sys. Concepts, Inc. v. Synopsys Inc.*, 374 F.3d 23, 31 (1st Cir. 2004); *Wagner v. Pennwest Farm Credit, ACA*, 109 F.3d 909, 912 (3rd Cir. 1997).

The question raised in this case – whether federal statutes like the FCRA confer automatic standing to sue absent actual injury – is an issue of "exceptional importance" this Court should address. The Ninth Circuit's decision in this case exacerbates an already-existing circuit split on this issue and leaves DRI's members unable to predict accurately for their clients the outcome of suits brought under the FCRA and other similar statutes conferring statutory rights of action. Prior to this decision, the Second Circuit refused to allow a claim under ERISA to proceed absent actual injury. *Kendall v. Employees Retirement Plan of Avon Prods.*, 561 F.3d 112, 121 (2d Cir. 2009). That same year, the Sixth Circuit reached the opposite conclusion, holding that a plaintiff had Article III standing to bring an action under the FCRA absent any actual injury. *Beaudry v. TeleCheck Services*, 579 F.3d 702, 705-07 (6th Cir. 2009). The Seventh Circuit has

taken a similar stance, albeit in a more generalized way. See *Murray v. GMAC Mortgage Corp.*, 434 F.3d 948, 952-53 (7th Cir. 2006). To the contrary, the Fourth Circuit held just last year (in the context of an ERISA action) that the mere violation of a statutory right does not satisfy Article III's standing requirement. *David v. Alphin*, 704 F.3d 327, 338-39 (4th Cir. 2013).

Intra-circuit splits of authority further add to the bar's confusion. Over a decade ago, the Third Circuit held that plaintiffs must allege actual injury – not just a statutory violation of the Lanham Act, 15 U.S.C. § 1051 *et seq.*, in order to establish Article III standing. *Joint Stock Soc'y v. UDV North America*, 266 F.3d 164, 176 (3d Cir. 2001). This comports with the Third Circuit's earlier pronouncement in *Fair Housing Council of Suburban Philadelphia v. Main Line Times*, 141 F.3d 439, 443-444 (3d Cir. 1998), that "[t]he fact that a housing organization is able to show that a particular advertisement violates the [Fair Housing] Act is not sufficient to satisfy the requirements of Article III; a violation of the Act does not automatically confer standing on any plaintiff, even one who holds the status of a private attorney general." However, in 2009, the Third Circuit, in the context of the Real Estate Settlement Procedures Act of 1974 (RESPA), 12 U.S.C. § 2607(d)(2), held that "[a] plaintiff need not demonstrate that he or she suffered actual monetary damages, because 'the actual or threatened injury required by Art. III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing." *Alston v. Countrywide Financial Corp.*, 585 F.3d 753, 763 (3d Cir. 2009).

At least one federal circuit court is deferring decision on this issue, waiting for guidance from this Court. In a recent opinion, the Eighth Circuit expressed its' reluctance to address the "difficult constitutional question whether congress can drill through this hard floor of injury *in fact* by creating an injury *in law* (i.e., a statutory cause of action requiring no showing that the plaintiff was personally and actually harmed)[.]" *Wallace v. ConAgra Foods, Inc.*, --- F.3d ---, 2014 WL 1356860, at *6 (8th Cir. 2014). It noted that "[t]his constitutional question recently reached the Supreme Court without yielding an answer." (*Id.*, at *7, n. 3 (citing *First Am. Fin. v. Edwards*, 567 U.S. ---,--- (132 S.Ct. 2356 (2012) (per curiam)).

Finally, the Ninth Circuit in this case held that the "creation of a private cause of action to enforce a statutory provision implies that Congress intended the enforceable provision to create a statutory right," 742 F.3d at 412, and that "the violation of a statutory right is usually sufficient injury in fact to confer standing." *Id.* (citing *Edwards v. First Am. Corp.*, 610 F.3d 514, 517 (9th Cir. 2010)). Because "the statutory cause of action does not require a showing of actual harm when a plaintiff sues for willful violations[,]" *id.*, the Ninth Circuit reasoned that actual harm was unnecessary to establish injury in fact. In so ruling, the Ninth Circuit recognized that its analysis essentially turns the three-part test for Article III standing – which requires a showing of causation and redressability – into a single-factor inquiry satisfied by the availability of a statutory remedy. *Id.* at 414. In a remarkable departure from this Court's jurisprudence, the Ninth Circuit rationalized that "[w]hen the injury in fact is the

violation of a statutory right that we inferred from the existence of a private cause of action, causation and redressability will usually be satisfied." *Id.*

Clearly, application of the standing requirement to federal statutes creating private causes of action, like the Fair Credit Reporting Act, has caused much confusion amongst the federal circuits. The time is ripe for this Court to step in and reaffirm that the constitutional injury-in-fact requirement cannot be manufactured by Congress through enactment of a federal statute providing statutory damages for technical violations that result in no harm to plaintiffs. The current unpredictability created by the circuit split makes it difficult for DRI's members to accurately advise their clients on whether to litigate a suit brought under one of these statutes or settle. In addition, the lack of predictability makes it difficult for defense counsel, their clients, or any insurers covering the claim to properly place a value on the case for settlement purposes or to set reserves. This Court has the opportunity to restore uniformity to the nation's courts and clarify the outer limits, if any, of the constitutional standing requirement under federal and state statutes providing statutory damages. Failure to do so will have a devastating impact on the businesses and individuals DRI's members are regularly called upon to defend.

C. Absent review and clarification by this Court, the relaxed standing requirement adopted by the Ninth Circuit will encourage needless litigation, dramatically increase costs for businesses and individuals, and encourage forum shopping.

The FCRA is just one of a myriad of federal statutes embracing this "no harm" approach to litigation. From the Telephone Consumer Protection Act to the Real Estate Settlement Procedures Act to the Truth in Lending Act, Congress has authorized suits based on a mere statutory violation. For example, the Telephone Consumer Protection Act, 47 U.S.C. § 227(3), allows a private right of action with an alternative-damages provision. Similarly, the Real Estate Settlement Procedures Act, 12 U.S.C. § 2607, prohibits kickbacks in certain mortgage-loan transactions. The Truth in Lending Act, 15 U.S.C. § 1640, contains an alternative-damages provision that has been interpreted to allow a consumer to bring a claim and receive damages upwards of $500,000 without any showing of actual injury or damages. *See, e.g.*, *Gambardella v. G. Fox & Co.*, 716 F.2d 104 (2d Cir. 1983); *Purtle v. Eldridge Auto Sales, Inc.*, 91 F.3d 797 (6th Cir. 1996). Accordingly, absent review by this Court, the Ninth Circuit's decision may be used as a roadmap in suits well beyond those brought under the FCRA. The decision from the Ninth Circuit to narrow the standing doctrine to permit a suit in the absence of an actual injury could be applied to as many as fifteen federal statutes permitting suits based on mere statutory violations alone. *See, e.g.*, 15 U.S.C. § 1692 (Fair Debt Collection Practices Act); 29 U.S.C. § 1854 (Migrant and Seasonal Agricultural Worker Protection Act); 15

U.S.C. § 1693m(a)(2) (Electronic Funds Transfer Act); 12 U.S.C. § 4907 (Homeowners Protection Law); 15 U.S.C. § 1681, *et. seq*. (Fair and Accurate Credit Transactions Act).

These legislatively-conferred statutory suits can be brought through any of a number of means, but are typically brought in the form of a class action, as in this case. "The impact of federal statutes that allow the award of statutory damages for violations that cause no harm is exponentially multiplied by the class-action mechanism of Federal Rule of Civil Procedure 23." Michael O'Neil, *Privacy and Surveillance Legal Issues, Leading Lawyers on Navigating Changes in Security Program Requirements and Helping Clients Prevent Breaches - The Transformation of the "Right to Privacy" and its Unintended Liability Consequences*, 2014 WL 10441, *6 (Aspatore Jan. 2014).

Relaxation of the standing requirement will broaden dramatically the composition of a class litigating a violation of the FCRA or other similar "no harm" statute. This, in turn, will dramatically increase the expense of defending a class action. Even before the Ninth Circuit's decision in this case, the attendant costs of a major lawsuit could sound the death knell for new companies and those suffering under today's current economic climate. Bradley J. Bondi, *Facilitating Economic Recovery and Sustainable Growth Through Reform of the Securities Class-Action System: Exploring Arbitration as an Alternative to Litigation*, 33 Harv. J. L. & Pub. Pol'y, 607, 612 (Spring 2010). With the new lax standing requirement announced by the Ninth Circuit, defendants may be forced to make payouts to hundreds or even thousands

of unharmed class members. In addition, due to the violation of some statutory standard, a non-injured plaintiff might be deemed a "prevailing party" entitled to attorney fees.

The unwarranted economic burden this imposes on defendants cannot be overstated. As one legal scholar noted, "aggregated statutory damages claims can result in absurd liability exposure in the hundreds of millions – or even billions – of dollars on behalf of a class whose actual damages are often nonexistent." Sheila B. Scheuerman, *Due Process Forgotten: The Problem of Statutory Damages and Class Actions*, 74 Mo. L. Rev. 103, 104 (Winter 2009). Stated another way, a class judgment based on a statutory damages claim can have an "annihilating effect" on a defendant. *O'Neil*, *supra*, at *6. Defendants, unwilling to roll the dice, are placed under intense pressure to settle, even if an adverse judgment seems "improbable." See *Thorogood v. Sears, Roebuck and Co.*, 547 F.3d 42, 745 (7th Cir. 2008); *Matter of Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995). See also Barry F McNiel, *et. al.*, *Mass Torts and Class Actions: Facing Increased Scrutiny*, 167 F.R.D. 483, 489-90 (updated 8/5/96). The Ninth Circuit's holding in this case, if left uncorrected by this Court, will only exacerbate these problems and proliferate more of these "blackmail settlements." *Rhone*, *supra* at 1298, citing Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (1973).

Equally troubling, DRI's members will have no way to predict whether their clients will fall victim to these ills. Certainly, the Ninth Circuit's relaxation of class certification requirements will encourage potential class members to forum-shop, a practice looked upon

with disfavor by the Court. See *Piper Aircraft Co v. Reyno*, 454 U.S. 235, 254 (1981); *Deposit Guaranty Nat. Bank, Jackson, Miss. v. Roper*, 445 U.S. 326 (1980). Beyond that, because of confusion among the federal circuits, DRI's members and clients have no way of knowing what standard a particular court will apply. DRI therefore has a strong interest in assuring that this Court adopts a clear standing rule that is capable of consistent application across the country.

Careful adherence to the standing doctrine serves to guard against the ills set forth above. Litigation brought by entrepreneurial class action attorneys attempting to serve as private attorneys general in lieu of the federal government harms the civil justice system, both because it creates enormous litigation costs with no attendant benefit and because it destabilizes the carefully-calibrated equilibrium between the political branches of government and the judiciary. By limiting suits to the constitutional framework of a "case" or "controversy," standing assures that corporations and individuals will not be subject to academic litigation where the complaining party has suffered no real injury. And it also guards against plaintiff attorneys, and particularly class action attorneys, receiving exorbitant fees that may put a corporation out of business for a statutory violation unaccompanied by any cognizable injury. On the other hand, by allowing Congress to create a statutory cause of action, defendants are incentivized to conform their conduct to the law. Accordingly, it is imperative that this Court review the Ninth Circuit's decision.

CONCLUSION

For the foregoing reasons, Amicus Curiae DRI respectfully urges the Court to grant Spokeo, Inc.'s Petition for Writ of Certiorari.

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

SPOKEO, INC.,

Petitioner,

v.

THOMAS ROBINS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR AMICI CURIAE EBAY INC., FACEBOOK, INC., GOOGLE INC., AND YAHOO! INC. IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF AMICI CURIAE 1

REASONS FOR GRANTING THE PETITION 4

I. THE QUESTION PRESENTED IS IMPORTANT AND WILL AFFECT FEDERAL LITIGATION INVOLVING MANY FEDERAL AND STATE STATUTES 4

A. The Decision Below Concludes That Plaintiffs Who Have Suffered No Actual Harm Still Have Standing 4

B. The Ninth Circuit's Holding Implicates Numerous Federal Statutes 5

C. The Question Presented Also Implicates Standing To Pursue State Law Claims In Federal Court 9

D. The *In Terrorem* Effect Of Statutory Damages May Cause Defendants To Settle Even Meritless Claims 12

II. THIS COURT'S GUIDANCE IS NECESSARY TO RESOLVE CONFUSION AMONG THE LOWER COURTS 15

A. There Is A Deep And Longstanding Circuit Split 15

B. This Entrenched Circuit Split Has Resulted In Confusion And Inconsistent Rulings Among The District Courts 17

TABLE OF CONTENTS—Continued

Page

III. THE NINTH CIRCUIT'S DECISION INCORRECTLY PERMITS PLAINTIFFS WHO HAVE SUFFERED NO HARM TO MAINTAIN SUITS MERELY BY SEEKING STATUTORY DAMAGES 19

A. Injury In Law Alone Cannot Satisfy Article III's "Case Or Controversy" Requirement 19

B. Enforcement Of Statutory Violations That Cause No Harm Is The Province Of The Executive Branch, Not The Courts 21

CONCLUSION 22

TABLE OF AUTHORITIES

CASES

Page(s)

Allen v. *Wright*, 468 U.S. 737 (1984) 21

Alston v. *Countrywide Financial Corp.*, 585 F.3d 753 (3d Cir. 2009) 16

AT&T Mobility LLC v. *Concepcion*, 131 S. Ct. 1740 (2011) 13

Baker v. *Carr*, 369 U.S. 186 (1962) 20

Beaudry v. *TeleCheck Services, Inc.*, 579 F.3d 702 (6th Cir. 2009) 15

Bell Atlantic Corp. v. *Twombly*, 550 U.S. 544 (2007) 13

C.M.D. v. *Facebook, Inc.*, 2014 WL 1266291 (N.D. Cal. Mar. 26, 2014) 10

DaimlerChrysler Corp. v. *Cuno*, 547 U.S. 332 (2006) 11

David v. *Alphin*, 704 F.3d 327 (4th Cir. 2013) 16

Day v. *Bond*, 500 F.3d 1127 (10th Cir. 2007) 15

Deacon v. *Pandora Media, Inc.*, 901 F. Supp. 2d 1166 (N.D. Cal. 2012) 10

Doe v. *National Board of Medical Examiners*, 199 F.3d 146 (3d Cir. 1999) 16

Edwards v. *First American Corp.*, 610 F.3d 514 (9th Cir. 2010), *cert. granted*, 131 S. Ct. 3022 (2011), *cert. dismissed*, 132 S. Ct. 2536 (2012) ..... *passim*

Flast v. *Cohen*, 392 U.S. 83 (1968) 20

TABLE OF AUTHORITIES—Continued

Page(s)

Gaos v. *Google Inc.*, 2012 WL 1094646 (N.D. Cal. Mar. 29, 2012) 7

Gladstone Realtors v. *Village of Bellwood*, 441 U.S. 91 (1979) 20

Goodman v. *HTC America, Inc.*, 2012 WL 1499745 (W.D. Wash. Mar. 2, 2012) 15

Goodman v. *HTC America, Inc.*, 2012 WL 2412070 (W.D. Wash. June 26, 2012) 11

Halaburda v. *Bauer Publishing Co.*, 2013 WL 4012827 (E.D. Mich. Aug. 6, 2013) 18

Hammer v. *Sam's East, Inc.*, 2014 WL 2524534 (8th Cir. June 5, 2014) 16

In re Barnes & Noble Pin Pad Litigation, 2013 WL 4759588 (N.D. Ill. Sept. 3, 2013) 18

In re Facebook Privacy Litigation, 791 F. Supp. 2d 705 (N.D. Cal. 2011) 6, 7

In re Google Inc. Cookie Placement Consumer Privacy Litigation, 2013 WL 5582866 (D. Del. Oct. 9, 2013) 18

In re Google Referrer Header Privacy Litigation, 2014 WL 1266091 (N.D. Cal. Mar. 26, 2014) 13, 14

In re Hulu Privacy Litigation, 2012 WL 2119193 (N.D. Cal. June 11, 2012) 9, 18

In re Hulu Privacy Litigation, 2013 WL 6773794 (N.D. Cal. Dec. 20, 2013) 8, 9

TABLE OF AUTHORITIES—Continued

Page(s)

In re iPhone Application Litigation, 844 F. Supp. 2d 1040 (N.D. Cal. 2012) 7, 11

In re Netflix Privacy Litigation, 2013 WL 1120801 (N.D. Cal. Mar. 18, 2013) 9, 13

In re Zynga Privacy Litigation, 2014 WL 1814029 (9th Cir. May 8, 2014) 7

Kendall v. *Employees Retirement Plan of Avon Products*, 561 F.3d 112 (2d Cir. 2009) 16

Lane v. *Facebook, Inc.*, 2010 WL 9013059 (N.D. Cal. Mar. 17, 2010) 14

Lane v. *Facebook, Inc.*, 696 F.3d 811 (9th Cir. 2012) 14

Lexmark International, Inc. v. *Static Control Components, Inc.*, 134 S. Ct. 1377 (2014) 21

Low v. *LinkedIn Corp.*, 2011 WL 5509848 (N.D. Cal. Nov. 11, 2011) 8

Low v. *LinkedIn Corp.*, 900 F. Supp. 2d 1010 (N.D. Cal. 2012) 11

Lujan v. *Defenders of Wildlife*, 504 U.S. 555 (1992) 10, 19, 20

Raines v. *Byrd*, 521 U.S. 811 (1997) 19, 20

Saunders v. *Equifax Information Services, LLC*, 469 F. Supp. 2d 343 (E.D. Va. 2007) 14

Shaw v. *Marriott International, Inc.*, 605 F.3d 1039 (D.C. Cir. 2010) 15

Steel Co. v. *Citizens for a Better Environment*, 523 U.S. 83 (1998) 21

TABLE OF AUTHORITIES—Continued

Page(s)

Sterk v. *Best Buy Stores, LP*, 2012 WL 5197901 (N.D. Ill. Oct. 17, 2012) 18

Tyler v. *Michaels Stores, Inc.*, 840 F. Supp. 2d 438 (D. Mass. 2012) 17

Wallace v. *ConAgra Foods, Inc.*, 747 F.3d 1025 (8th Cir. 2014) 14

Warth v. *Seldin*, 422 U.S. 490 (1975) 21

Wersal v. *LivingSocial, Inc.*, 2013 WL 3871434 (D. Minn. July 26, 2013) 18

DOCKETED CASES

Holland v. *Yahoo! Inc.*, No. 13-cv-4980 (N.D. Cal.) 7

Sherman v. *Yahoo! Inc.*, No. 13-cv-41 (S.D. Cal.) 7

AGENCY MATERIALS

In the Matter of Snapchat, Inc., FTC File No. 132-3078 (May 8, 2014) 22

United States v. *Path, Inc.*, FTC File No. 122-3158 (Feb. 8, 2013) 22

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

U.S. Const. art. III, § 2 ..... *passim*

Cable Communications Privacy Act, 47 U.S.C. § 551(f)(1)-(2) 8

Class Action Fairness Act, 28 U.S.C. § 1332(d) 9

TABLE OF AUTHORITIES—Continued

Page(s)

Credit Repair Organizations Act, 15 U.S.C. § 1679g(a)(1)(B) 8

Driver's Privacy Protection Act, 18 U.S.C. § 2724(a)-(b) 8

Electronic Funds Transfer Act, 15 U.S.C. § 1693m(a)(2) 8

Equal Credit Opportunity Act, 15 U.S.C. § 1691e(a) 8

Expedited Funds Availability Act, 12 U.S.C. § 4010(a)(2) 8

Fair Credit Reporting Act, 15 U.S.C. § 1681n(a)(1)(A) 4

Fair Debt Collection Practices Act, 15 U.S.C. § 1692k(a)(1), (2)(A) 8

Homeowners Protection Act, 12 U.S.C. § 4907(a)(1) 8

Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. § 1854(a), (c) 8

Real Estate Settlement Procedures Act, 12 U.S.C. § 2607(d) 8

Stored Communications Act, 18 U.S.C. §§ 2701-2712 6
§ 2707(a) 7
§ 2707(b)(3) 7
§ 2707(c) 7

Telephone Consumer Protection Act, 47 U.S.C. § 227(b)(3) 8

TABLE OF AUTHORITIES—Continued

Page(s)

Truth in Lending Act, 15 U.S.C. § 1640(a)(1) 8

Video Privacy Protection Act, 18 U.S.C.
§ 2710 8
§ 2710(c)(1) 8

Wiretap Act, 18 U.S.C.
§§ 2510-2522 6
§ 2520(a) 6
§ 2520(c)(2)(B) 6

Illinois Right of Publicity Act, 765 Ill. Comp. Stat. 1075/1 *et seq.* 10

Michigan Video Rental Privacy Act, Mich. Comp. Laws § 445.1712 10

S. Ct. R. 37.6 .....

INTEREST OF AMICI CURIAE[1]

Amici are leading technology companies that provide services via the Internet to hundreds of millions of users each day.

eBay Inc. is a leader in global commerce that delivers flexible and scalable solutions through eBay, PayPal, and eBay Enterprises and other business units. eBay delivers one of the world's largest online marketplaces, with 128 million users and more than 550 million listings at the end of 2013. PayPal provides flexible and innovative payment solutions for consumers and merchants all over the world; in 2013, PayPal was available in approximately 193 countries and 26 currencies and had 143 million active registered accounts. eBay Enterprises helps companies of all sizes expand commerce by offering engaging shopping experiences online and offline.

Facebook, Inc. provides a free social media service to more than 1.2 billion global users that empowers them to connect with others, to discover what is happening in their communities, and to share their views on the world. The service is now provided in over 100 languages and dialects.

Google Inc. is a technology company that offers a suite of web-based products and services to billions of people worldwide. Google's business started with its

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[1] Pursuant to Rule 37.6, amici certify that no counsel for either party authored this brief, and no person or party other than named amici and their counsel made a monetary contribution to the preparation or submission of this brief. Counsel of record for all parties received notice of amici's intent to file this brief at least ten days prior to its due date and have consented to its filing. Letters of consent have been filed with the Court.

search engine and now includes a variety of other products and services, such as Gmail, YouTube, Google Maps, Drive, and the Android operating system.

Yahoo! Inc., together with its consolidated subsidiaries, is focused on making the world's daily habits inspiring and entertaining. By creating highly personalized experiences for its users, Yahoo keeps people connected to what matters most to them across devices and around the world. Yahoo reaches more than 800 million monthly active users.

The services offered by amici have created or transformed a wide range of industries, including electronic communications of all forms; financial transactions and online commerce; social networking; delivery of video, television, music and other media content; and the organization and accessibility of information. Amici are proven innovators that continue to cultivate valuable technology through significant investments in research and development. However, due to the nature of their businesses, amici engage in many activities that may be subject to federal and state laws that contain private causes of action and statutory damages provisions similar to the provisions contained in the Fair Credit Reporting Act (FCRA). Many of these laws, like FCRA, provide a private right of action for alleged violations and statutory damages. If the Ninth Circuit's rule stands, plaintiffs may pursue suits against amici even where they are not actually harmed by an alleged statutory violation, and in certain circumstances, seek class action damages that could run into the billions of dollars.[2]

---

[2] Amici's interest in this case is limited to the Article III standing question presented, and should not be construed as expressing any view on the merits of petitioner's alleged statutory violations.

Permitting such "no-injury" lawsuits to proceed has an increasingly negative impact on amici due to the broad-scale nature of their operations. Amici interact with hundreds of millions of users each day, using highly efficient automated mechanisms to process and facilitate billions of transactions and interactions. These mechanisms enable amici to unlock the power of the Internet and to deliver immense value to users. But this structure also makes amici vulnerable to the untoward consequences of the Ninth Circuit's misreading of Article III and this Court's precedent.

Rather than requiring concrete, actual harm to establish a "case or controversy" appropriate for judicial resolution, the Ninth Circuit allows suits for statutory violations with no limiting principle. Thus, if any of the millions of individuals who interact with amici is willing (or is enticed by a plaintiff's attorney) to allege that a generalized practice or act violated a law providing a private cause of action and statutory damages, then she could launch a putative class action on behalf of herself and millions of other "similarly situated" users. She could pursue a multi-billion dollar statutory damages claim despite the lack of injury to herself or any other class member. Even without pursuing a class action, a single plaintiff could attempt to obtain punitive damages through an individual suit under FCRA or other similar statutes, or injunctive relief, which is available under many other statutes that also provide statutory damages. The attendant expense of litigating such actions and the potential for punitive damages or burdensome injunctive relief creates a strong incentive to settle even the most baseless suits, rewarding plaintiffs (and their attorneys) for filing meritless strike suits in circumstances where no one has been harmed. Amici request that this Court grant certiorari to confirm, as

dictated by the Constitution and this Court's precedent, that Article III standing does not exist when no plaintiff alleges an actual injury.

REASONS FOR GRANTING THE PETITION

I. THE QUESTION PRESENTED IS IMPORTANT AND WILL AFFECT FEDERAL LITIGATION INVOLVING MANY FEDERAL AND STATE STATUTES

A. The Decision Below Concludes That Plaintiffs Who Have Suffered No Actual Harm Still Have Standing

Respondent Robins's putative class complaint alleges that Spokeo is a credit reporting agency (Pet. App. 19a-20a) and willfully violated various provisions of FCRA, which provides consumers with a private right of action to recover "any actual damages ... *or* damages of not less than $100 and not more than $1,000" for any willful failure to comply with the various requirements imposed by the Act. 15 U.S.C. § 1681n(a)(1)(A) (emphasis added). Robins seeks statutory damages for himself and a putative class that allegedly "consists of millions of individuals." Pet. 15. On Spokeo's motion, the district court dismissed the complaint for lack of Article III standing because Robins had not alleged "any actual or imminent harm." Pet. App. 2a.

The Ninth Circuit reversed, holding that Robins had standing because "alleged violations of [his] statutory rights are sufficient to satisfy the injury-in-fact requirement of Article III." Pet. App. 8a. In so holding, the court relied on *Edwards* v. *First American Corp.*, a case in which this Court granted certiorari to review the same Article III standing question presented in this petition, but later dismissed without opinion.

See Pet. App. 6a, 7a, 9a (citing *Edwards* v. *First Am. Corp.*, 610 F.3d 514 (9th Cir. 2010), *cert. granted*, 131 S. Ct. 3022 (2011), *cert. dismissed*, 132 S. Ct. 2536 (2012)). Because the Ninth Circuit "determine[d] that Robins has standing by virtue of the alleged violations of his statutory rights," the court expressly declined to consider whether Robins' unsubstantiated allegations of "harm to his employment prospects or related anxiety could be sufficient injuries in fact." Pet. App. 9a n.3.

B. The Ninth Circuit's Holding Implicates Numerous Federal Statutes

The Ninth Circuit squarely held that "alleged violations of ... statutory rights are sufficient to satisfy the injury-in-fact requirement of Article III." Pet. App. 8a. This holding implicates a broad swath of federal statutes that contain private rights of action and provide for statutory damages.

Amici are concerned that this decision will substantially and improperly lower the bar for invoking the jurisdiction of federal courts, inviting abusive and costly litigation, including class actions seeking millions or even billions of dollars in statutory damages under FCRA and similar statutes. Amici are members of a rapidly growing and transforming technology industry that provides services to hundreds of millions of individuals each day. Users of amici's services routinely conduct financial transactions, share information and content, and interact with people all over the world on platforms offered by amici. The services amici provide, the information they collect, and the interactions they facilitate arguably could be subject to laws that contain private rights of action and allow for statutory damages.

For example, certain amici have already been named as defendants in putative class action suits seeking statutory damages under the Wiretap Act (as amended by the Electronic Communications Privacy Act of 1986), 18 U.S.C. §§ 2510-2522, and the Stored Communications Act (SCA), 18 U.S.C. §§ 2701-2712, and have challenged plaintiffs' Article III standing. Applying the Ninth Circuit's rule, district courts have held that the only "injury" that must be alleged in these suits against amici, like the case at bar, is a statutory violation; actual harm resulting from the purported violations need not be alleged. Thus, as here, plaintiffs have been permitted to maintain their suits against amici, despite no allegation of actual harm, under the rule articulated by the Ninth Circuit in *Edwards* and applied by the court below in this case.

In *In re Facebook Privacy Litigation*, 791 F. Supp. 2d 705, 712 (N.D. Cal. 2011), for example, the complaint alleged in part that the defendant had transmitted user information in violation of the Wiretap Act, which provides a private right of action for "any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used" in violation of the Act, 18 U.S.C. § 2520(a), and establishes "statutory damages of whichever is the greater of $100 a day for each day of violation or $10,000," *id.* § 2520(c)(2)(B). In denying Facebook's motion to dismiss the complaint for lack of standing, the district court concluded that "Plaintiffs allege a violation of their statutory rights under the Wiretap Act" and that such an allegation was "sufficient to establish that they have suffered the injury re-

quired for standing under Article III." *Facebook Privacy Litig.*, 791 F. Supp. 2d at 712.[3]

Similarly, in *Gaos* v. *Google Inc.*, 2012 WL 1094646 (N.D. Cal. Mar. 29, 2012), the plaintiff filed a putative class complaint alleging a violation of the SCA, which provides a private right of action to any "subscriber, or other person aggrieved" by a knowing or intentional violation of the Act, 18 U.S.C. § 2707(a), statutory damages of $1,000 for each plaintiff, *id.* § 2707(c), and the right to recover attorneys' fees and costs, *id.* § 2707(b)(3), (c). The district court rejected Google's argument that the plaintiff lacked standing, stating that "a plaintiff may be able to establish constitutional injury in fact by pleading a violation of a right conferred by statute" and that "the SCA provides a right to judicial relief based only on a violation of the statute without additional injury." *Gaos*, 2012 WL 1094646, at *3.[4]

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[3] The Ninth Circuit recently affirmed the district court's ruling on standing in this suit against Facebook, noting that "a plaintiff demonstrates an injury sufficient to satisfy Article III when bringing a claim under a statute that prohibits the defendant's conduct and grants 'persons in the plaintiff's position a right to judicial relief.'" *In re Zynga Privacy Litig.*, 2014 WL 1814029, at *5 n.5 (9th Cir. May 8, 2014) (consolidated opinion) (quoting *Edwards*, 610 F.3d at 517).

[4] Yahoo has faced similar litigation, though the Article III standing issue has not been addressed in these cases. *See, e.g.*, *Holland* v. *Yahoo! Inc.*, No. 13-cv-4980 (N.D. Cal. Oct. 25, 2013) (consolidated putative class action complaints for statutory damages and injunctive relief under the Wiretap Act); *Sherman* v. *Yahoo! Inc.*, No. 13-cv-41 (S.D. Cal. Jan. 8, 2013) (putative class action complaint for statutory damages and injunctive relief under the Telephone Consumer Protection Act). Other companies in the Internet and technology industries have also faced litigation presenting the same standing issues. *See, e.g.*, *In re iPhone Applica-*

Many other federal statutes couple private rights of action with statutory damages as well. Those statutes include the Telephone Consumer Protection Act, 47 U.S.C. § 227(b)(3); Video Privacy Protection Act, 18 U.S.C. § 2710(c)(1); Real Estate Settlement Procedures Act, 12 U.S.C. § 2607(d); Cable Communications Privacy Act, 47 U.S.C. § 551(f)(1)-(2); Truth in Lending Act, 15 U.S.C. § 1640(a)(1); Fair Debt Collection Practices Act, 15 U.S.C. § 1692k(a)(1), (2)(A); Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. § 1854(a), (c); Electronic Funds Transfer Act, 15 U.S.C. § 1693m(a)(2); Expedited Funds Availability Act, 12 U.S.C. § 4010(a)(2); Homeowners Protection Act, 12 U.S.C. § 4907(a)(1); Equal Credit Opportunity Act, 15 U.S.C. § 1691e(a); Driver's Privacy Protection Act, 18 U.S.C. § 2724(a)-(b); and the Credit Repair Organizations Act, 15 U.S.C. § 1679g(a)(1)(B).

Amici, like other Internet and technology companies, are potentially subject to suit under one or more of these statutes, often in unpredictable contexts far outside the statutes' original purposes. For example, in *In re Hulu Privacy Litigation*, 2013 WL 6773794, at *1 (N.D. Cal. Dec. 20, 2013), the putative class complaint alleges a violation of the Video Privacy Protection Act (VPPA), which provides a private right of action, statutory damages, and the ability to recover punitive damages and attorneys' fees and costs. 18 U.S.C. § 2710.

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tion Litig., 844 F. Supp. 2d 1040, 1055 (N.D. Cal. 2012) (concluding that "a violation of the Wiretap Act or the [SCA] may serve as a concrete injury for the purposes of Article III injury analysis"); *Low* v. *LinkedIn Corp.*, 2011 WL 5509848, at *6 n.1 (N.D. Cal. Nov. 11, 2011) (recognizing open question but not deciding "whether the statutory right created by the [SCA] is sufficient to overcome the standing hurdle in [the] case").

The complaint alleges that defendant Hulu, which provides television shows, movies, and other content to viewers over the Internet, disclosed information about users' viewing selections to advertisers, social networks, and Internet analytics companies, but the complaint did not allege any actual harm resulting from these disclosures. *See Hulu Privacy Litig.*, 2013 WL 6773794, at *1. The district court rejected Hulu's standing challenge, concluding that the plaintiffs need not "show actual injury that is separate from a statutory violation to recover ... liquidated damages." *Id.* at *4; *see also In re Hulu Privacy Litig.*, 2012 WL 2119193, at *8 (N.D. Cal. June 11, 2012) ("Plaintiffs establish an injury (and standing) by alleging a violation of a statute.").[5]

C. The Question Presented Also Implicates Standing To Pursue State Law Claims In Federal Court

Many state statutes also provide private rights of action and statutory damages, some of which may be heard in federal courts based on diversity jurisdiction or the Class Action Fairness Act (CAFA), 28 U.S.C. § 1332(d). Accordingly, federal courts are also called upon to decide whether plaintiffs have Article III standing to seek enforcement of these state statutes.

Thus, while the Ninth Circuit below relied on this Court's precedent that Article III "does not prohibit *Congress* from 'elevating to the status of legally cog-

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[5] The *Hulu* litigation is not an outlier. Streaming video provider Netflix recently entered into a settlement with a class estimated to exceed 60 million individuals in a lawsuit alleging that it unlawfully retained viewing information in violation of the VPPA. *In re Netflix Privacy Litig.*, 2013 WL 1120801, at *1 (N.D. Cal. Mar. 18, 2013); *see also infra* p. 13 (discussing settlement terms).

nizable injuries concrete, *de facto* injuries that were previously inadequate in law'" (Pet. App. 7a-8a (emphasis added) (quoting *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 578 (1992))), the question presented in this case is not so limited. Properly understood, the standing question presented in this petition also implicates the ability of *state legislatures* to create new "injuries" that plaintiffs can seek to enforce in *federal courts*.

As with the similar federal statutes, these state statutes providing private rights of action and statutory damages are frequently asserted in federal courts against Internet and technology companies. For example, the following cases all applied the Ninth Circuit's holding in *Edwards* to address the plaintiffs' standing to bring *state law* claims:

- In *C.M.D.* v. *Facebook, Inc.*, 2014 WL 1266291, at *2-3 (N.D. Cal. Mar. 26, 2014), the court analyzed whether plaintiffs had Article III standing to bring a putative class claim, alleging only an injury-in-law, under the Illinois Right of Publicity Act, 765 Ill. Comp. Stat. 1075/1 *et seq.*, which provides for statutory damages of $1,000 per violation and punitive damages for willful violations.

- In *Deacon* v. *Pandora Media, Inc.*, 901 F. Supp. 2d 1166, 1171-1172 (N.D. Cal. 2012), the court considered whether plaintiffs had Article III standing to bring a putative class claim, alleging only an injury-in-law, under the Michigan Video Rental Privacy Act, Mich. Comp. Laws § 445.1712, which provides a private right of action and statutory damages of $5,000 per person along

with the right to recover attorneys' fees and costs.

- In *Goodman* v. *HTC America, Inc.*, 2012 WL 2412070, at *8 (W.D. Wash. June 26, 2012), the court considered whether plaintiffs had Article III standing, based on allegations of injury-in-law alone, in a putative class action alleging violations of multiple state statutes, including statutes providing for statutory damages and injunctive relief.

As these cases demonstrate, the Article III standing question presented in this case is not limited to FCRA or even to the litany of federal statutes providing a private right of action and the right to recover statutory damages.[6] The decision below, if allowed to stand, would potentially permit no-injury lawsuits in federal court not only under federal statutes, but also under numerous state statutes.

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[6] In cases where plaintiffs allege multiple causes of action, the Ninth Circuit's erroneous Article III standing jurisprudence has also led district courts to reach the troubling conclusion that the alleged violation of a single statute confers standing to pursue all of a plaintiff's disparate claims. *See, e.g.*, *Low* v. *LinkedIn Corp.*, 900 F. Supp. 2d 1010, 1021 (N.D. Cal. 2012) (allegation that defendant violated SCA and California right to privacy provides standing in suit also alleging violation of California False Advertising Law, common law claims for breach of contract, conversion, unjust enrichment, and negligence); *iPhone Application Litig.*, 844 F. Supp. 2d at 1055 (suggesting that alleged violation of the Wiretap Act provides standing in suit also alleging violations of the California Consumer Legal Remedies Act, California Unfair Competition Law, and common law claims for negligence, trespass, conversion, and unjust enrichment). Yet this Court has squarely held that "a plaintiff must demonstrate standing for each claim he seeks to press." *DaimlerChrysler Corp.* v. *Cuno*, 547 U.S. 332, 352 (2006).

D. The *In Terrorem* Effect Of Statutory Damages May Cause Defendants To Settle Even Meritless Claims

The standing doctrine plays a critical role in our court system. Faithful application of Article III serves an important gatekeeping function by keeping lawsuits that are not suited to judicial resolution—because nobody has actually suffered harm—out of the court system. This gatekeeping function is important even where, as frequently occurs, the targets of these suits have valid defenses on the merits—the standing doctrine prevents both defendants and federal courts from the burden of litigating suits where no plaintiff claims actual injury.

As the district court below correctly reasoned, if an allegation of a "[m]ere violation of the [FCRA]" conferred standing "where no injury in fact is properly pled," then the "federal courts will be inundated by web surfers' endless complaints." Pet. App. 23a-24a. This inundation has already commenced; Internet and technology companies are frequently the targets of class complaints alleging violations of a wide variety of state and federal statutes that combine private rights of action with statutory damages provisions. Amici, and those similarly situated, provide services to millions of users all over the world each day via highly efficient, automated systems that empower users and provide immense value. Because of this, however, amici are particularly vulnerable to both numerous individual complaints and class complaints seeking even modest statutory damages for each violation or user, either of which can threaten absurd potential damage awards and litigation costs. The increasing frequency of such litigation against amici and others in their industry is a

significant, unjustified burden when no plaintiff has suffered an actual harm.

The time and litigation expenses involved in challenging such claims, combined with even a remote risk of a potentially astronomical damage award, can create immense pressure to settle. This is true even when the cases are baseless on the merits. *AT&T Mobility LLC* v. *Concepcion*, 131 S. Ct. 1740, 1752 (2011) (when faced with "even a small chance of a devastating loss," defendants will feel significant "pressure[]" to settle even "questionable claims"); *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 559 (2007) (expensive litigation "will push cost-conscious defendants to settle even anemic cases").

For example, streaming video provider Netflix recently settled a putative class action alleging violations of the VPPA and seeking statutory damages on behalf of an asserted class of approximately 62 million individuals, making the total potential damages exposure more than $150 *billion*. *Netflix Privacy Litig.*, 2013 WL 1120801, at *1. Notably, as frequently occurs in these cases, only a handful of the class members who were purportedly "harmed" received any compensation for their "injuries," while class counsel was well compensated. *Id.* at *1-2 (approving $9 million settlement where $2.25 million went to class counsel; $30,000 went to be shared among the named plaintiffs; and, after administration expenses, the balance of the settlement fund went to *cy pres* recipients).

In another recent case, Google entered into a proposed class settlement of lawsuits alleging that Google had violated the SCA. *In re Google Referrer Header Privacy Litig.*, 2014 WL 1266091 (N.D. Cal. Mar. 26, 2014). In its order preliminarily approving the proposed settlement, the court noted "that the full amount

of statutory damages ... is likely *in the trillions* of dollars considering the size of the class," *id.* at *5 n.4 (emphasis added), which the plaintiffs estimated to "exceed[] one hundred million individuals," *id.* at 6, since it "potentially covers all internet users in the United States," *id.* at 7. The court found that Google had "viable" defenses and that it was "entirely possible that Defendant could ultimately prevail." *Id.* at *5. The $8.5 million proposed settlement came years into the litigation, with "the next motion to dismiss ... pending at the time [the proposed settlement] was filed." *Id.*

And in another case, Facebook settled a putative class complaint in which the class was estimated to exceed 3.6 million people. *Lane* v. *Facebook, Inc.*, 2010 WL 9013059, at *2 (N.D. Cal. Mar. 17, 2010). The court noted that the plaintiffs sought statutory damages of $2,500 per violation under the VPPA, and $10,000 per violation under the Wiretap Act. *Id.* With Facebook's potential liability in the billions of dollars, the court approved a $9.5 million settlement, of which $3 million went to attorneys' fees, administrative costs, and incentive payments to class representatives and $6.5 million went to a new charity set up by the parties. *Id.* at *1; *Lane* v. *Facebook, Inc.*, 696 F.3d 811, 817 (9th Cir. 2012).

The *in terrorem* effect is not limited to class actions seeking statutory damages multiplied by huge numbers of putative class members. FCRA and many other similar statutes allow plaintiffs to sue for both statutory and punitive damages. *See, e.g.*, *Saunders* v. *Equifax Info. Servs., LLC*, 469 F. Supp. 2d 343, 345 (E.D. Va. 2007) (denying remittitur after jury awarded statutory damages of $1,000 and punitive damages of $80,000 under FCRA). In addition, many such statutes allow plaintiffs to seek injunctive relief. *See, e.g.*, *Goodman* v.

HTC Am., Inc., 2012 WL 1499745 (W.D. Wash. Mar. 2, 2012) (complaint seeking injunctive relief under California statute that also provides for statutory damages).

II. This Court's Guidance Is Necessary To Resolve Confusion Among The Lower Courts

A. There Is A Deep And Longstanding Circuit Split

The courts of appeals have rendered inconsistent opinions when addressing whether plaintiffs have standing to maintain suits that allege injuries in law with no allegation of actual harm.

The Ninth, Sixth, Tenth, and D.C. Circuits have held that a plaintiff need not allege anything more than a violation of a statutorily imposed duty, so long as the statute also creates a private right of action. Pet. App. 8a; *Edwards*, 610 F.3d at 518; *Beaudry* v. *TeleCheck Servs., Inc.*, 579 F.3d 702, 707 (6th Cir. 2009) (concluding that "[n]o Article III (or prudential) standing problem ar[ose]" in lawsuit alleging bare violation of FCRA); *Day* v. *Bond*, 500 F.3d 1127, 1136 (10th Cir. 2007) ("It is long settled in the law that the actual or threatened injury required by Art. III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing." (internal quotation marks omitted)); *Shaw* v. *Marriott Int'l, Inc.*, 605 F.3d 1039, 1042 (D.C. Cir. 2010) ("[T]he violation of a statute can create the particularized injury required by Article III ... when 'an individual right' has been 'conferred on a person by statute.'").

In contrast, the Second and Fourth Circuits have held that allegations of breached statutory duties in the ERISA context do not "in and of themselves constitute[] an injury-in-fact sufficient for constitutional

standing." *Kendall* v. *Employees Ret. Plan of Avon Prods.*, 561 F.3d 112, 121 (2d Cir. 2009); *David* v. *Alphin*, 704 F.3d 327, 338 (4th Cir. 2013) (theory "that the deprivation of [plaintiffs'] statutory right [under ERISA] is sufficient to constitute an injury-in-fact for Article III standing ... conflates statutory standing with constitutional standing").

The Third Circuit has recognized that "[t]he proper analysis of standing focuses on whether the plaintiff suffered an actual injury, not on whether a statute was violated." *Doe* v. *National Bd. of Med. Exam'rs*, 199 F.3d 146, 153 (3d Cir. 1999). However, in a more recent case that failed to acknowledge this contrary circuit precedent, the Third Circuit held that a plaintiff bringing suit for a statutory violation "need not demonstrate that he or she suffered actual monetary damages" to satisfy the Article III standing requirement. *Alston* v. *Countrywide Fin. Corp.*, 585 F.3d 753, 763 (3d Cir. 2009).

The Eighth Circuit is in disarray. A panel recently held, over vigorous dissent, that the alleged invasion of the statutory right under FCRA "to obtain a receipt ... showing no more than the last five digits of the consumer's credit or debit card number" with no allegation of resulting harm was still "an injury-in-fact sufficient to confer Article III standing." *Hammer* v. *Sam's East, Inc.*, 2014 WL 2524534, at *4 (8th Cir. June 5, 2014); *but see id.* at *10 (Riley, C.J., dissenting) ("Ignoring the last thirty-nine years of Article III standing jurisprudence, the majority adopts an extraordinarily broad reading" of Supreme Court precedent, which "has never actually *held* an unharmed plaintiff had standing by virtue of a bare statutory violation"). Another recent Eighth Circuit decision acknowledged "the difficult constitutional question whether Congress can

drill through th[e] hard floor of injury *in fact* by creating an injury *in law* (i.e., a statutory cause of action requiring no showing the plaintiff was personally and actually harmed)," and specifically held that CAFA "does not ... extend federal jurisdiction to state claims—if any exist—permitting recovery for bare statutory violations without any evidence the plaintiffs personally suffered a real, non-speculative injury in fact." *Wallace* v. *ConAgra Foods, Inc.*, 747 F.3d 1025, 1032-1033 (8th Cir. 2014).

B. This Entrenched Circuit Split Has Resulted In Confusion And Inconsistent Rulings Among The District Courts

This conflicting appellate precedent has left the district courts struggling to decide the basic, threshold issue of standing in cases like this. As one district court recently observed, "[t]he current Supreme Court jurisprudence is not entirely clear as to whether a defendant's violation of a statute that confers a private right of action in and of itself constitutes an 'injury in fact' to those protected under the statute." *Tyler* v. *Michaels Stores, Inc.*, 840 F. Supp. 2d 438, 449 n.8 (D. Mass. 2012). Unsurprisingly, the district courts have issued inconsistent decisions as they confront this conflicting precedent.

Indeed, the district court's rulings in this case are illustrative: The district court twice reversed itself in deciding the standing issue. *Compare* Pet. App. 13a (initially finding no standing where Plaintiff alleged "violation of a statute that grants individuals a private right of action"), *with id.* 18a (subsequently concluding that "Plaintiff has alleged an injury in fact" in the form of "alleged FCRA violations"), *with id.* 23a (finally concluding that "[m]ere violation of the [FCRA] does not

confer Article III standing ... where no injury in fact is properly pled").

The results are similarly inconsistent across the district courts. Many district courts have concluded that plaintiffs need not allege "any specific injury apart from the statutory violation" to satisfy Article III's standing requirement. *Halaburda* v. *Bauer Publ'g Co.*, 2013 WL 4012827, at *4 (E.D. Mich. Aug. 6, 2013) (finding standing in suit alleging injury in law under Michigan statute); *see also In re Google Inc. Cookie Placement Consumer Privacy Litig.*, 2013 WL 5582866, at *3 (D. Del. Oct. 9, 2013) ("[A] statutory violation, in the absence of any actual injury, may in some circumstances create standing under Article III."); *Hulu Privacy Litig.*, 2012 WL 2119193, at *8 ("Under current law, ... Plaintiffs establish an injury (and standing) by alleging a violation of a statute.").

Other district courts, however, have concluded that the bare allegation of a statutory violation is insufficient to establish standing. For example, one district court recently concluded in a case alleging violations of the VPPA that "a plaintiff must plead an injury beyond a statutory violation to meet the standing requirement of Article III." *Sterk* v. *Best Buy Stores, LP*, 2012 WL 5197901, at *4-5 (N.D. Ill. Oct. 17, 2012); *cf. Halaburda*, 2013 WL 4012827, at *4 (expressing "some hesitation in finding that [bare] allegations [of statutory violations] meet the definition of an injury in fact"). Other district courts have similarly held that more than an injury in law is required. *In re Barnes & Noble Pin Pad Litig.*, 2013 WL 4759588, at *3 (N.D. Ill. Sept. 3, 2013) ("Plaintiffs must plead an injury beyond a statutory violation to meet the standing requirement of Article III."); *Wersal* v. *LivingSocial, Inc.*, 2013 WL 3871434, at *3 n.4 (D. Minn. July 26, 2013) ("While a violation of a

statute can create a legal right, the Court is not persuaded that [plaintiff]'s claims of statutory violations do not require satisfaction of Article III's standing requirement.").

This deep confusion in the federal courts pertaining to the fundamental question of standing provides further reason for this Court to grant the petition.

III. The Ninth Circuit's Decision Incorrectly Permits Plaintiffs Who Have Suffered No Harm To Maintain Suits Merely By Seeking Statutory Damages

A. Injury In Law Alone Cannot Satisfy Article III's "Case Or Controversy" Requirement

"'No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies.'" *Raines* v. *Byrd*, 521 U.S. 811, 818 (1997). The decision below incorrectly held that "alleged violations of Robins's statutory rights" with nothing more "are sufficient to satisfy the injury-in-fact requirement of Article III" (Pet. App. 8a), thereby allowing Robins to pursue his putative class claim for statutory damages despite the lack of any alleged actual harm. The decision relies on the Ninth Circuit's conclusion in *Edwards* that "the standing question in such cases is whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief" (Pet. App. 6a (quoting *Edwards*, 610 F.3d at 517)), and this Court's statement that Congress may elevate "to the status of legally cognizable injuries concrete, de facto injuries that were previously inadequate in law" (Pet. App. 7a-8a (citing *Lujan*, 504 U.S. at 578)).

The Ninth Circuit's conclusion that the alleged violation of any "statutory right" confers standing is unduly broad. *Lujan* teaches that Congress cannot create an injury in fact out of whole cloth, but may only create a legal remedy for actual "de facto injuries." Thus, Congress's ability to define new legal rights does not abrogate the Constitution's limitation of the "judicial Power" to "Cases" or "Controversies," U.S. Const. art. III, § 2, a limit designed to ensure "that federal courts will not be asked to decide ill-defined controversies" or "suits ... which are feigned or collusive in nature." *Flast* v. *Cohen*, 392 U.S. 83, 100 (1968); *Baker* v. *Carr*, 369 U.S. 186, 204 (1962) (standing requirement "assure[s] that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends"). The decision below flouts this Court's clear pronouncement that "[i]n no event, however, may Congress abrogate the Art. III minima: A plaintiff must always have suffered 'a distinct and palpable injury to himself,' that is likely to be redressed if the requested relief is granted." *Gladstone Realtors* v. *Village of Bellwood*, 441 U.S. 91, 100 (1979); *see also id.* at 99 ("[T]he plaintiff must show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant.").

The existence of a statutory right of action does not eliminate the requirement of injury in fact. "Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing." *Raines*, 521 U.S. at 820 n.3. The panel's holding is fundamentally inconsistent with this Court's clear teaching that even if Congress "grant[s] an express right of action ... [o]f course, Art. III's requirement remains: the plaintiff

still must allege a distinct and palpable injury to himself." *Warth* v. *Seldin*, 422 U.S. 490, 501 (1975).

B. Enforcement Of Statutory Violations That Cause No Harm Is The Province Of The Executive Branch, Not The Courts

When a statutory violation causes no actual harm, enforcement is properly left to the executive branch, not to unharmed individual plaintiffs functioning as private attorneys general. This basic principle flows from the separation of powers, which is the foundation for Article III's standing requirement. *Allen* v. *Wright*, 468 U.S. 737, 752 (1984) ("Art. III standing is built on a single basic idea—the idea of separation of powers."); *see also Lexmark Int'l, Inc.* v. *Static Control Components, Inc.*, 134 S. Ct. 1377, 1386 (2014) (standing doctrine derives from "separation-of-powers principles"). The "federal courts may exercise power only 'in the last resort, and as a necessity,' and only when adjudication is 'consistent with a system of separated powers and [the dispute is one] traditionally thought to be capable of resolution through the judicial process.'" *Allen*, 468 U.S. at 752 (citation omitted); *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 102 (1998) (standing doctrine ensures that federal courts adjudicate only disputes "traditionally amenable to, and resolved by, the judicial process"). Thus, only plaintiffs who can demonstrate actual harm sufficient to meet the Article III standing requirement may invoke the jurisdiction of the federal courts.

Moreover, proper application of standing doctrine will not leave statutory violations that do not cause actual harm unaddressed; such violations are appropriately subject to enforcement by the executive branch. Where Congress determines that actual and wide-

spread violations of statutes should be addressed, notwithstanding the absence of any actual injury to consumers, it can and does provide for regulatory and even criminal enforcement. Indeed, FCRA, the Wiretap Act, and the SCA, among others, all include provisions for regulatory enforcement. These provisions are not toothless—the executive branch has demonstrated its willingness to actively scrutinize business's activities under other similar statutes. *See, e.g., In the Matter of Snapchat, Inc.*, FTC File No. 132-3078 (May 8, 2014) (proposed FTC consent agreement regarding alleged privacy violations by Snapchat application); *United States* v. *Path, Inc.*, FTC File No. 122-3158 (Feb. 8, 2013) (consent agreement between FTC and Path regarding alleged privacy violations by a social networking application).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

SPOKEO, INC.,

Petitioner,

v.

THOMAS ROBINS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR EXPERIAN INFORMATION SOLUTIONS, INC., AS *AMICUS CURIAE* SUPPORTING PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

REASONS FOR GRANTING THE PETITION 2

I. THE RULING BELOW PERMITTING LITIGATION OVER STATUTORY VIOLATIONS THAT HARM NO ONE PRESENTS A QUESTION OF GREAT SIGNIFICANCE 4

A. No-Harm Actions Are Filed Regularly and Threaten Defendants with Staggering Liability 4

B. The Ninth Circuit's Approval of No-Harm Actions Expands Federal Jurisdiction Significantly 13

CONCLUSION 18

TABLE OF AUTHORITIES

Page(s)

CASES

Allen v. Wright,
468 U.S. 737 (1984) 15

AT&T Mobility LLC v. Concepcion,
131 S. Ct. 1740 (2011) 12

Bateman v. American Multi-Cinema, Inc.,
623 F.3d 708 (9th Cir. 2010) 9

Coopers & Lybrand v. Livesay,
437 U.S. 463 (1978) 12

Doe v. Chao,
540 U.S. 614 (2004) 14

Dreher v. Experian Info. Solutions, Inc.,
No. 11-cv-624-JAG (E.D. Va.) 6

Evans v. U-Haul Co. of California,
No. CV 07-2097-JFW, 2007 U.S. Dist. LEXIS
82026 (C.D. Cal. Aug. 14, 2007) 9

FEC v. Akins,
524 U.S. 11 (1998) 14

First American Fin. Corp. v. Edwards,
132 S. Ct. 2536 (2012) 2

Gezahegne v. Whole Foods Market California, Inc.
No. 14-cv-00592 (N.D. Cal.) 7

Harris v. Experian Info. Solutions, Inc.,
No. 6:06-cv-1808-GRA
(D.S.C. June 30, 2009) 5

Hathaway v. Whole Foods Market California, Inc.
No. 14-cv-00663 (S.D. Cal.) 7

In re Rhone-Poulenc Rorer Inc.,
51 F.3d 1293 (7th Cir. 1995) 12

Knights v. Publix Super Markets, Inc.
No. 14-cv-00720 (M.D. Tenn.) 7

Lewis v. Casey,
518 U.S. 343 (1996)..... 13, 15

Lopez v. KB Toys Retail, Inc.,
No. CV 07-144-JFW, 2007 U.S. Dist. LEXIS
82025 (C.D. Cal. July 17, 2007)..... 8, 9

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992)..... 13, 14, 15, 16

Murray v. GMAC Mortgage Corp.,
434 F.3d 948 (7th Cir. 2006) 11

Parker v. Time Warner Entm't Co.,
331 F.3d 13 (2d Cir. 2003)..... 13

Ragland v. Guardsmark, LLC
No. 14-cv-00693 (S.D. Cal.) 7

Raines v. Byrd,
521 U.S. 811 (1997)..... 3, 14

Safeco Ins. Co. of Am. v. Burr,
551 U.S. 47 (2007)..... 11

Shady Grove Orthopedic Assocs., P.A. v.
Allstate Ins. Co.,
559 U.S. 393 (2010)..... 12

Steel Co. v. Citizens for a Better Environment,
523 U.S. 83 (1998)..... 14, 15

Summers v. Earth Island Inst.,
555 U.S. 488 (2009)..... 4, 13

Taylor v. Acxiom Corp.,
No. 2:07cv0001, 2008 U.S. Dist. LEXIS 115940 (E.D. Tex. Sept. 9, 2008), *aff'd*, 612 F.3d 325 (5th Cir. 2010) 9, 10, 12

Taylor v. Acxiom Corp.,
612 F.3d 325 (5th Cir. 2010) 10

Trans Union LLC v. Federal Trade Comm'n,
536 U.S. 915 (2002)..... 11

Valley Forge Christian Coll. v. Americans United for Separation of Church & State,
454 U.S. 464 (1982)..... 14

Vt. Agency of Natural Resources v. United States ex rel. Stevens,
529 U.S. 765 (2000)..... 15, 16

Warth v. Seldin,
422 U.S. 490 (1975)..... 13

White v. Experian Info. Solutions, Inc.,
No. 05-cv-1070-DOC-MLG
(C.D. Cal. Jan. 26, 2009) 6

STATUTES

15 U.S.C. § 1681b(b) 7

15 U.S.C. § 1681e(b) 4, 5

15 U.S.C. § 1681n 1, 2

Anti-Counterfeiting Consumer Protection Act of 1996, 15 U.S.C. §§ 1116(d), 1117(c)..... 10

Anti-Cybersquatting Consumer Protection Act of 1999, 15 U.S.C. § 1125(d) 10

Cable Piracy Act, 47 U.S.C. § 605(e)..... 10

Cable Privacy Act, 47 U.S.C. § 551(f) 10, 14

Driver's Privacy Protection Act,
18 U.S.C. §§ 2721-2725..... 9

Fair and Accurate Credit Transactions Act, 15 U.S.C. § 1681c(g) 8

Worker Adjustment and Retraining Notification Act of 1988, 29 U.S.C. § 2104(a)(3) 10

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INTEREST OF *AMICUS CURIAE* [1]

Experian Information Solutions, Inc. (Experian) is a nationwide consumer reporting agency subject to regulation under the Fair Credit Reporting Act (FCRA). The Ninth Circuit held below that plaintiffs claiming an FCRA violation "with respect to" them, 15 U.S.C. § 1681n, automatically satisfy the injury-in-fact requirement of Article III without any need to inquire into whether the alleged violation caused them any harm.

Consumer reporting agencies like Experian serve, essentially, as warehouses of consumer credit information. Experian maintains credit files on more than 200 million consumers, and, each day, answers 2 million credit inquiries and processes up to 50 million updates to its credit information database from lenders and other data furnishers.

As a nationwide consumer reporting agency, Experian is frequently subject to class action lawsuits by plaintiffs who have experienced no actual harm but seek class-wide statutory damages for alleged technical violations of the FCRA. Such suits are possible because the Act permits plaintiffs to sue for between $100 and $1,000 in statutory damages for any willful departure from FCRA requirements "with respect to" a consumer, without expressly requiring that the consumer be injured by what may be a

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[1] All parties have consented in writing to the filing of this *amicus curiae* brief more than 10 days prior to its due date. No counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus curiae* or its counsel made a monetary contribution to the preparation or submission of this brief.

wholly technical violation. Indeed, it is not uncommon in these cases for significant numbers of class members to have actually *benefited* from the alleged violations. Due to the large number of credit files, updates, and inquiries Experian handles, these suits can involve millions of putative class members, and thereby threaten staggering liability.

Experian accordingly has a strong interest in the enforcement of the constitutional requirement that only plaintiffs who have suffered an injury in fact may sue.

REASONS FOR GRANTING THE PETITION

This case cleanly presents the constitutional issue this Court was unable to resolve in *First American Financial Corp. v. Edwards*, 132 S. Ct. 2536 (2012): whether plaintiffs have Article III standing to sue for statutory damages regardless of whether they have suffered any concrete harm. The FCRA permits statutory damages (in a sum between $100 and $1,000) for any willful violation of the FCRA's requirements "with respect to a consumer." 15 U.S.C. § 1681n. The Ninth Circuit held below that a plaintiff has Article III standing to seek such statutory damages even if the alleged statutory violation did not harm him—according to the Ninth Circuit, a violation of the plaintiff's "statutory rights" *automatically* constitutes a "concrete, *de facto* injury" sufficient to satisfy Article III. Pet. App. 8a.

This holding deepens a circuit split on what constitutes an injury in fact under Article III, and broadens Article III standing well beyond anything this Court has previously endorsed. To be sure, statutory damages have a legitimate role that is consistent with Article III: to provide relief when a

plaintiff has been injured but damages are difficult to quantify. But the Ninth Circuit held here that Article III is satisfied without any real world injury at all, so long as the defendant allegedly committed a statutory violation "with respect to" the plaintiff.

As the petition explains, the circuits are divided on this question. Plaintiffs injured only in the abstract by a statutory violation, with no accompanying identifiable harm, have standing to seek statutory damages in the Sixth, Seventh, Eighth, and Ninth Circuits, but not in the Second or Fourth. *See* Pet. at 9-12. Moreover, under the FCRA, such consumers (and entrepreneurial lawyers) routinely seek to represent enormous putative classes, and thus threaten defendants with crushing liability on the basis of technical violations that harmed no one. Whether uninjured consumers have standing to seek statutory damages thus has exceptional importance to the many parties regulated by the FCRA. Indeed, this question is deeply significant to litigation under any of the many statutes that, like the FCRA, fix statutory damages without regard to the actual harm suffered.

Moreover, the decision below departs from this Court's jurisprudence on Article III standing. "It is settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing." *Raines v. Byrd*, 521 U.S. 811, 820 n.3 (1997). Yet the Ninth Circuit reasoned that Respondent has standing "by virtue of the alleged violations of his statutory rights" alone, for which "suffering actual damages" is unnecessary. Pet. App. 7a, 9a n.3. But many statutory violations—even

those "with respect to" a particular consumer—inflict no injury (or even benefit the consumer). If a statutory violation alone automatically suffices under Article III, the injury-in-fact requirement becomes an empty formality—which cannot be squared with the well-settled tenet that "the requirement of injury in fact is the hard floor of Article III jurisdiction that cannot be removed by statute." *Summers v. Earth Island Inst.*, 555 U.S. 488, 497 (2009).

This Court's review is thus strongly warranted, to resolve the conflict among the circuits on this fundamentally important question.

I. THE RULING BELOW PERMITTING LITIGATION OVER STATUTORY VIOLATIONS THAT HARM NO ONE PRESENTS A QUESTION OF GREAT SIGNIFICANCE.

The Ninth Circuit now permits litigation under the FCRA over a statutory violation that merely relates to the plaintiff, even if the violation does not harm the plaintiff. This holding, and others like it, both poses a major threat to the Article III limits on the role of the federal courts, and has enormous real-world consequences.

A. No-Harm Actions Are Filed Regularly and Threaten Defendants with Staggering Liability.

One of the most frequent types of lawsuits filed under the FCRA is a claim of inaccuracy in consumer credit reports, under the FCRA provision requiring "reasonable procedures to assure maximum possible accuracy of the information" in each report. 15 U.S.C. § 1681e(b). Under the holding below, there is no longer any need for the alleged inaccuracy to have harmed the plaintiff. Instead, any inaccuracy

whatsoever "with respect to" a consumer can give rise to a federal action—even if the inaccuracy is inconsequential or, worse, *benefited* the plaintiff (as occurs when, for example, a delinquent debt is incorrectly reported as timely paid). In short, according to the Ninth Circuit, even harmless or beneficial violations related to a consumer constitute injury-in-fact sufficient to satisfy Article III.

Anomalous as they may seem, such no-harm lawsuits are frequent under the FCRA. For example, in *Harris v. Experian Information Solutions, Inc.*, No. 6:06-cv-1808-GRA (D.S.C. June 30, 2009), the plaintiff class claimed that Experian and other credit reporting agencies violated § 1681e(b)'s "reasonable procedures" requirement by failing to report consumers' credit limits for their Capital One credit cards (information that Capital One refused to provide to credit reporting agencies). The omission of credit-limit information had no consistent effect on consumers: it decreased the credit scores of only certain consumers, while *increasing* the scores of many others, and having no effect on yet others. *Harris*, No. 6:06-cv-1808-GRA, slip op. at 5. Although the named plaintiff was one of those who had actually benefited from the alleged violation, he sought to represent a class of over four million consumers—including the many consumers whose credit scores were increased by the alleged inaccuracy—which, at $100 to $1,000 per violation, sought aggregate statutory damages between $400 million and $4 billion. The district court certified a class that included the consumers who benefited from the alleged violation—and therefore plainly had not been harmed or injured (in any ordinary sense of those words) by the alleged violation. *Id.* at 8-12. All

of these consumers would have Article III standing under the decision below, because the Ninth Circuit held that the mere existence of a statutory violation qualifies as "injury" for purposes of Article III.

Likewise, in *White v. Experian Information Solutions, Inc.*, No. 05-cv-1070-DOC-MLG (C.D. Cal. Jan. 26, 2009), the plaintiff claimed that Experian and two other nationwide consumer reporting agencies, Trans Union and Equifax, violated the FCRA by not reporting that certain debts had been discharged in bankruptcy. The claimed error, however, had no impact on many debtors and actually *improved* the credit scores of many others. *White*, No. 05-cv-1070-DOC-MLG, slip op. at 9. Nevertheless, the plaintiffs sought between hundreds of millions and billions of dollars in statutory damages on behalf of a class of nearly eight million consumers. The district court deferred a final ruling on the class's viability, but found "serious constitutional issues" implicated by the class's Article III standing. *Id.* at 11. Any such doubts about the class's standing, however, would be obviated today in the Ninth Circuit, under the decision below.

Dreher v. Experian Information Solutions, Inc., No. 11-cv-624-JAG (E.D. Va.), is a recent example of a putative class action alleging a violation that is entirely irrelevant to most class members. The *Dreher* plaintiff alleges that Experian inaccurately reported the *name* of his creditor, by listing his debt with Advanta Bank instead of CardWorks, a company assigned to handle the accounts after Advanta Bank was placed in receivership. He seeks statutory damages on behalf of roughly 150,000 consumers affected by the same issue, yet most (if not

all) of these consumers will not have been harmed in any way by this technical inaccuracy. Experian has challenged Article III standing in opposition to the plaintiff's class certification motion, which is still pending.

Another theory of no-harm liability, seen regularly under the FCRA, targets 15 U.S.C. § 1681b(b)(2), which requires a party requesting a consumer's credit report "for employment purposes" to have (1) told the consumer about the request "in a document that consists solely of the disclosure," and (2) obtained the consumer's consent. § 1681b(b)(2)(A)(i)-(ii). At least four class actions have been filed this year seeking only statutory damages for an alleged violation of this provision. *See Knights v. Publix Super Markets, Inc.* (M.D. Tenn. No. 14-cv-00720); *Gezahegne v. Whole Foods Market California, Inc.* (N.D. Cal. No. 14-cv-00592); *Hathaway v. Whole Foods Market California, Inc.* (S.D. Cal. No. 14-cv-00663); *Ragland v. Guardsmark, LLC* (S.D. Cal. No. 14-cv-00693). Each suit's only purported basis for liability is the defendant's failure to provide a *standalone* disclosure. *See* § 1681b(b)(2)(A)(i) (requiring "a document that consists *solely* of the disclosure" (emphasis added)). These plaintiffs do not claim to have been unaware of the disclosure, to have not consented to the request, or to have otherwise been harmed in any identifiable way. Nonetheless, they seek $100 to $1,000 per non-standalone disclosure on behalf of sizable putative classes. These injury-free suits would seem prone to dismissal for lack of Article III standing—but were all filed in the Sixth and Ninth Circuits, where that argument is currently unavailable.

Indeed, this very case is an example of a class action concerning no concrete harm. Respondent alleges that Petitioner violated the FCRA by inaccurately reporting a variety of seemingly positive facts about him: that he "has a graduate degree, that his economic health is 'Very Strong,' and that his wealth level [] is in the 'Top 10%.'" Compl. ¶ 32. Respondent further alleges that his consumer report wrongly reports "that he was employed in a professional or technical field," even though he in fact "is currently out of work and seeking employment." *Id.* ¶¶ 31, 34. Despite the fact that Respondent likely benefits from these inaccuracies—which would presumably *improve* his standing with a potential employer—he seeks to represent a class of "millions of individuals," which, at $100 to $1,000 per violation, seeks aggregate statutory damages exceeding $1 billion. *Id.* ¶ 39, p. 16.

Nor are such no-harm statutory damages suits limited to credit reporting. Numerous lawsuits were filed in the wake of the 2003 Fair and Accurate Credit Transactions Act (FACTA), which required retailers to redact the expiration date and all but the last five digits of a credit card number on all electronically printed receipts. 15 U.S.C. § 1681c(g). In many of these putative class actions, the plaintiffs claimed no actual injury from the failure to redact, but nevertheless sought hundreds of millions or even billions of dollars in statutory damages.

In *Lopez v. KB Toys Retail, Inc.*, No. CV 07-144-JFW (CWx), 2007 U.S. Dist. LEXIS 82025, at *14-15 (C.D. Cal. July 17, 2007), for example, the plaintiff sought statutory damages between $290 million and $2.9 billion, even though, as the court noted, the

putative class members could not have been harmed by the inclusion of their credit card numbers' first four (not last five) digits, which merely identify the issuing bank. And in *Evans v. U-Haul Co. of California*, No. CV 07-2097-JFW, 2007 U.S. Dist. LEXIS 82026, at *14-17 (C.D. Cal. Aug. 14, 2007), the plaintiff sought between $115 million and $1.5 billion in statutory damages for the defendant's inclusion of expiration dates on receipts, despite admitting that she suffered no harm from the practice. [2] *See generally* Sheila B. Scheuerman, *Due Process Forgotten: The Problem of Statutory Damages and Class Actions*, 74 Mo. L. Rev. 103, 104-06, 111-14, 134-35 (2009).

Likewise, in *Taylor v. Acxiom Corp.*, No. 2:07cv0001, 2008 U.S. Dist. LEXIS 115940 (E.D. Tex. Sept. 9, 2008), *aff'd*, 612 F.3d 325 (5th Cir. 2010), the plaintiffs sought a staggering $5 trillion in statutory damages for alleged violations of the Driver's Privacy Protection Act (DPPA), 18 U.S.C. §§ 2721-2725, on behalf of a class of 20 million Texas drivers. Although they claimed that the defendants had violated the DPPA by obtaining a database of Texas driver information (to avoid piecemeal requests each time a defendant lawfully needed to access driver information), the plaintiffs did not claim any injury in fact—that is, they did not claim that any

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[2] Although the district court in both *Lopez* and *Evans* denied class certification in part because the staggering amount of statutory damages sought was wholly out of proportion to the harm alleged (*i.e.*, none), the Ninth Circuit subsequently rejected such disproportionality as a basis for denying class certification. *See Bateman v. American Multi-Cinema, Inc.*, 623 F.3d 708, 721 (9th Cir. 2010).

defendant used or disclosed their personal information for any impermissible purpose. *Id.* at *32.[3]

Indeed, the U.S. Code provides ample fodder for no-harm actions like these. As the petition explains, a wide range of federal statutes authorize statutory damages without regard to any actual injury suffered by the plaintiff. *See* Pet. at 16-19 (collecting statutes).[4] Under the decision below and others like it, all of these acts could be used by creative lawyers to launch class actions seeking enormous sums where plaintiffs have suffered no concrete injury—or worse, have actually benefited—from the alleged violations.

Actions of this type, which essentially co-opt the federal courts to enforce abstract statutory violations, are more than just a nuisance. They present a serious threat of staggering liability in the absence of

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[3] The district court dismissed for lack of Article III standing and for failure to state a claim. The Fifth Circuit affirmed on the latter basis, without expressly reaching the standing question—but noted in dicta that the plaintiffs would have standing even though they alleged no unlawful disclosure or use that might constitute a concrete injury. 612 F.3d at 340 n.15.

[4] There are still more examples of such statutes. *See, e.g.*, Anti-Counterfeiting Consumer Protection Act of 1996, 15 U.S.C. §§ 1116(d), 1117(c) (between $1,000 and $200,000 per counterfeit mark and up to $2 million for willful violation); Anti-Cybersquatting Consumer Protection Act of 1999, 15 U.S.C. § 1125(d) (between $1,000 and $100,000 for each bad faith violation); Cable Piracy Act, 47 U.S.C. § 605(e) (between $1,000 and $10,000 per violation, and between $10,000 and $100,000 per willful violation); Cable Privacy Act, 47 U.S.C. § 551(f)(2)(A) (greater of $100 per day of violation or $1,000); Worker Adjustment and Retraining Notification Act of 1988, 29 U.S.C. § 2104(a)(3) ($500 per day of violation).

any actual harm suffered by an individual consumer. Indeed, in many such cases, the named plaintiffs will actually waive any claims for actual damages in an attempt to increase their chances of obtaining class certification on their statutory damages claims. *See, e.g., Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 54 (2007) (claiming no actual harm); *Murray v. GMAC Mortgage Corp.*, 434 F.3d 948, 952-53 (7th Cir. 2006). Rather than litigate the alleged statutory violations in the context of the actual individual injuries they might cause, these plaintiffs seek to litigate their claims in the abstract in order to maximize recovery, even though they have no concrete interest in the action other than the mere possibility of recovering statutory damages.

Such windfall damages can cripple or destroy businesses. For companies like Experian, for example, the FCRA's statutory damages of $100 to $1,000 per violation can quickly add up to crushing liability, in that credit reporting agencies generally maintain files on millions of consumers (often hundreds of millions) and may be sued over procedures that apply to large numbers of those consumers. *See, e.g., Trans Union LLC v. Federal Trade Comm'n*, 536 U.S. 915, 917 (2002) (Kennedy, J., dissenting from denial of cert.) ("Because the FCRA provides for statutory damages of between $100 and $1,000 for each willful violation, petitioner [a nationwide consumer reporting agency] faces potential liability approaching $190 billion."); Scheuerman, *supra*, 74 Mo. L. Rev. at 104. Moreover, when such suits concern a putative nationwide class—as occurs regularly with Experian and other credit reporting agencies—the cases can often be steered into the circuits with the looser

understanding of Article III standing, where judges must ignore the absence of harm when assessing the action's viability.

Faced with potential liability in the hundreds of millions or billions (or even trillions, *see Taylor*, 2008 U.S. Dist. LEXIS 115940) of dollars—liability that would sink even large companies—defendants are put under tremendous pressure to settle, even when the class's claims are questionable and the defendants have meritorious defenses. This Court has often noted "the risk of '*in terrorem*' settlements that class actions entail." *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752 (2011) ("Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims."); *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978) ("Certification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense."); *see also In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) (Posner, J.) (noting "intense pressure to settle"); Henry J. Friendly, *Federal Jurisdiction: A General View*, 120 (1973) (calling settlements induced by small probabilities of immense judgments in class actions "blackmail settlements"). And the risk of defendants being forced into unfair settlements is exacerbated in statutory damages class actions. As Justice Ginsburg recently explained: "When representative plaintiffs seek statutory damages, pressure to settle may be heightened because a class action poses the risk of massive liability unmoored to actual injury." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 445 (2010) (Ginsburg, J., dissenting);

see also Parker v. Time Warner Entm't Co., 331 F.3d 13, 22 (2d Cir. 2003) (aggregated statutory damages claims can produce "an *in terrorem* effect on defendants, which may induce unfair settlements"); *id.* at 29 (Newman, J. concurring) (same).

For all of these reasons, the law of the Ninth Circuit, like that of the Sixth, Seventh, and Eighth Circuits, threatens liability of staggering proportions decoupled from any actual harm, even where—as here—the consumer may have benefited from the alleged statutory violation. The conflict in the lower courts on this fundamental issue thus has great significance, and warrants this Court's review.

B. The Ninth Circuit's Approval of No-Harm Actions Expands Federal Jurisdiction Significantly.

This Court's review is also warranted because the Ninth Circuit's holding broadens Article III standing well beyond anything this Court has ever endorsed.

"[T]he requirement of injury in fact is the hard floor of Article III jurisdiction that cannot be removed by statute." *Summers*, 555 U.S. at 497. This essential element of Article III's case or controversy "'is founded in concern about the proper—and properly limited—role of the courts in a democratic society.'" *Id.* at 492-93 (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975)). That role is limited to vindicating the rights of individuals and "redress[ing] or prevent[ing] actual or imminently threatened injury to persons caused by private or official violation of law." *Id.* at 492; *see also Lewis v. Casey*, 518 U.S. 343, 353 n.3 (1996); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 569-70 (1992). As a necessary corollary, then, Congress can "elevat[e] to the status

of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law," *Lujan*, 504 U.S. at 578, but "[i]t is settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing." *Raines*, 521 U.S. at 820 n.3; *see also* Richard H. Fallon, Jr., Daniel J. Meltzer & David L. Shapiro, *Hart and Wechsler's The Federal Courts and the Federal System* 153 (5th ed. 2003).

In keeping with these principles, a mere violation of a statute with respect to a particular individual—absent some actual adverse affect on that individual—is not an "injury" sufficient to confer Article III standing. *Cf. Doe v. Chao*, 540 U.S. 614, 624 (2004) ("[T]he reference in § 552a(g)(1)(D) [which creates a cause of action for statutory damages under the Privacy Act] to 'adverse effect' acts as a term of art identifying a potential plaintiff who satisfies the injury-in-fact and causation requirements of Article III standing, and who may consequently bring a civil action without suffering dismissal for want of standing to sue."). A plaintiff's interest in such a case is no different from the general public interest "in seeing that the law is obeyed," which this Court has repeatedly held is insufficient for a private litigant to invoke the judicial power. *E.g.*, *FEC v. Akins*, 524 U.S. 11, 24 (1998); *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 107 (1998); *Valley Forge Christian Coll. v. Americans United for Separation of Church & State*, 454 U.S. 464, 485 (1982).

Similarly, Congress cannot manufacture standing simply by offering a bounty to private plaintiffs for bringing suits to enforce the law. Although a bounty

may give a plaintiff a concrete interest in the outcome of a suit, this Court has held that an "interest unrelated to injury in fact is insufficient to give a plaintiff standing." *Vt. Agency of Natural Resources v. U.S. ex rel. Stevens*, 529 U.S. 765, 772 (2000). An interest, such as a bounty or an award of attorney's fees, "that is merely a 'byproduct' of the suit itself cannot give rise to a cognizable injury in fact for Article III standing purposes." *Id.* at 773; *see Steel Co.*, 523 U.S. at 107 ("[A] plaintiff cannot achieve standing to litigate a substantive issue by bringing suit for the costs of bringing suit.").

As this Court has repeatedly explained, the "actual injury" component of Article III's case or controversy requirement is necessary to maintain the separation of powers. *Lewis*, 518 U.S. at 353 n.3; *Lujan*, 504 U.S. at 559-60, 576-77. "[F]ederal courts may exercise power only in the last resort, and as a necessity, and only when adjudication is consistent with a system of separated powers and the dispute is one traditionally thought to be capable of resolution through the judicial process." *Allen v. Wright*, 468 U.S. 737, 752 (1984). "We accept the judiciary's displacement of the democratically elected branches when necessary to decide an actual case," but in the absence of the need to remedy an individual's injury, the courts may not reach out to address alleged violations of the law. John G. Roberts, *Article III Limits On Statutory Standing*, 42 Duke L.J. 1219, 1230 (1993).

Consistent with these limitations, Congress cannot authorize roving private attorneys general to seek out violations of the law that have caused them no actual injury and prosecute them in court in the

hopes of obtaining a bounty. *Lujan*, 504 U.S. at 576-77; *id.* at 580-81 (Kennedy, J., concurring). To do so would be to "transfer from the President to the courts the Chief Executive's most important constitutional duty, to 'take Care that the Laws be faithfully executed,' Art. II, § 3." *Id.* at 577 (majority opinion); *see also* Tara Leigh Grove, *Standing as an Article II Nondelegation Doctrine*, 11 U. Pa. J. Const. L. 781 (2009); Harold J. Krent & Ethan G. Shenkman, *Of Citizen Suits and Citizen Sunstein*, 91 Mich. L. Rev. 1793 (1993).

Statutory damages class actions of this type—where plaintiffs have suffered no injury, or worse, have actually *benefited*, from the alleged violations—starkly present the precise dangers this Court has repeatedly warned against in its Article III standing cases. *See, e.g.*, *Vt. Agency*, 529 U.S. at 772-73. In such suits, as in a private-attorney-general scheme, eligible plaintiffs are not differentiated from the general public by any injury they have suffered, and the courts are impermissibly enlisted into hearing abstract claims of FCRA violations unconnected to any concrete individual injury. The plaintiffs in these suits do not seek to "obtain[] compensation for, or prevent[], the violation of a legally protected right"; they seek only a bounty for prevailing in the litigation—little different from "a wager upon the outcome." *Vt. Agency*, 529 U.S. at 772-73.

The allegations in this action serve only to highlight this problem. As noted, Respondent claims that Petitioner violated the FCRA by reporting information that overstated his employment status and creditworthiness. Compl. ¶¶ 31-32, 34. Even though Respondent likely *benefited* from these

alleged inaccuracies, he seeks to represent a class of "millions of individuals," which, at $100 to $1,000 per violation, seeks aggregate statutory damages in excess of $1 billion. *Id.* ¶¶ 39, p. 16. In other words, Respondent has no actual concrete interest in this action other than the mere possibility of recovering statutory damages—an outcome directly at odds with longstanding principles of Article III standing.

In such circumstances, Petitioner, like the targets of other no-harm statutory damages suits under the FCRA, is threatened with one of the very dangers Article III's injury-in-fact requirement is designed to prevent—arbitrary enforcement by plaintiffs who are entirely unaffected by (or even benefited from) the challenged conduct, who lack any accountability, and whose prosecutorial discretion is limited only by the creativity of their claims. *See* Grove, *supra* at 784, 791, 807-09. Entrepreneurial lawyers representing statutory damages classes will not seek out the defendants and violations that cause the most harm to consumers (as we would expect an accountable Executive Branch to do), but will instead have every incentive to seek out violations that maximize class size—and therefore the aggregated statutory damages bounty—regardless of whether the violations actually injure anyone (or, indeed, even benefit class members). And with the *in terrorem* effect of such massive potential damages, opportunistic lawyers need not even bring claims for *actual* violations; so long as the violation is arguable and the class large enough, defendants will be forced to settle or risk bankruptcy.

In short, the consequences of the Ninth Circuit's decision underscore the importance of Article III's

constraints on standing. If left unaddressed, the decision below will all but erase those limits whenever Congress does not require a plaintiff to prove actual damages. This Court should correct the Ninth Circuit's error and bring uniformity to this fundamental question of federal law.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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AMICUS CURIAE BRIEF

Supreme Court, U.S.
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No. 13-1339

In The
Supreme Court of the United States

SPOKEO, INC.,

Petitioner,

v.

THOMAS ROBINS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF PROFESSIONAL BACKGROUND SCREENERS; THE NATIONAL CONSUMER REPORTING ASSOCIATION; AND PRECHECK AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Table of Contents i

Table of Authorities ii

Identity of the *Amici* 1

Summary of Argument 3

Argument 5

I. Permitting Suits to go Forward in the Absence of Injury-in-Fact Creates an Inherent Procedural Unfairness against Class-Action Defendants 5

II. The Ninth Circuit Rule Makes it Uneconomic to Contest Bare Statutory Violations of the Fair Credit Reporting Act 8

A. *Amici's* Members Make Extensive Efforts to Comply With the Law 11

B. The Ninth Circuit Rule Forces *Amici's* Members to Pay for Harm that They Did Not Cause 13

C. Agency Enforcement of the FCRA Vindicates the Public Interest in Technical Compliance 16

Conclusion 18

TABLE OF AUTHORITIES

Cases

Ashcroft v. Iqbal, 556 U.S. 662 (2009) 6, 7

Bell Atl. Corp. v. Twombly,
550 U.S. 544 (2007) 6

David v. Alphin, 704 F.3d 327 (4th Cir. 2013) 5

Dowell v. Wells Fargo Bank, NA,
517 F.3d 1024 (8th Cir. 2008) 17

Dura Pharm., Inc. v. Broudo,
544 U.S. 336 (2006) 6

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992) 5, 6

Safeco Ins. Co. of Am. v. Burr,
551 U.S. 47 (2007) 11

Simon v. E. Ky. Welfare Rights Org.,
426 U.S. 26 (1972) 16

Cases in which Pleadings are Cited

Henderson v. First Advantage Background Servs. Corp., No. 3:14-cv-00221
(E.D. Va. Mar. 24, 2014) 14

Henderson v. InfoMart, Inc.,
No. 3:13-cv-00578
(E.D. Va. Aug. 26, 2013) 14, 15, 16

Henderson v. Wal-Mart,
No. 3:14-cv-00208 (E.D. Va. Mar. 24, 2014) 15

Lozano-Rivera v. Universal City Nissan,
No. 2:14-cv-01010 (C.D. Cal. Feb. 10, 2014) 15

Robins v. Spokeo, Inc.,
No. 2:10-cv-05306 (C.D. Ca. Feb. 17, 2011) 15

Federal Statutes

12 U.S.C. § 5481(12)(F) 11
12 U.S.C. § 5564 17
12 U.S.C. § 5564(g) 11
15 U.S.C. § 1681 8
15 U.S.C. § 1681 *et seq.* 5
15 U.S.C. § 1681a(d)(1)(A) 8
15 U.S.C. § 1681a(d)(1)(B) 8
15 U.S.C. § 1681a(d)(1)(C) 8
15 U.S.C. § 1681a(f) 8
15 U.S.C. § 1681b *et seq.* 9
15 U.S.C. § 1681b(b)(2)(a) 15
15 U.S.C. § 1681c(f) 10
15 U.S.C. § 1681e(a) 9
15 U.S.C. § 1681e(b) 9
15 U.S.C. § 1681e(d) 9
15 U.S.C. § 1681g(c) 10
15 U.S.C. § 1681g(c)(2) 14
15 U.S.C. § 1681h(c) 10
15 U.S.C. § 1681i 12
15 U.S.C. § 1681i(a) 10
15 U.S.C. § 1681i(a)(1) 10
15 U.S.C. § 1681i(a)(5) 10

15 U.S.C. § 1681k(a)(2) 9
15 U.S.C. § 1681m(a) 10
15 U.S.C. § 1681n(a)(1)(A) 10
15 U.S.C. § 1681n(a)(2) 10
15 U.S.C. § 1681o 10, 12
15 U.S.C. § 1681s(a) 11, 17
15 U.S.C. § 1681s(b) 11, 17
15 U.S.C. § 1681s(c) 11
15 U.S.C. § 1681s(c)(1) 17
15 U.S.C. § 1681s(c)(2) 17
15 U.S.C. § 1681t 11

Other Authorities

2009 Year-End Report on the Federal Judiciary, http://www.supremecourt.gov/publicinfo/year-end/2009year-endreport.pdf 14

David Permut and Tamra Moore, Recent Developments in Class Actions: The Fair Credit Reporting Act, 61 Bus. L. 931 (2006) 14

Justin F Lavella & John W. McGuiness, *Insurance Coverage in Consumer Class Actions*, Corp. Couns., Oct. 2010 7

Press Release, FTC, Spokeo to Pay $800,000 to Settle FTC Charges Company Allegedly Marketed Information to Employers and Recruiters in Violation of FCRA (June 12, 2012), *available at* http://www.ftc.gov/news-events/press-releases/2012/06/spokeo-pay-800000-settle-ftc-charges-company-allegedly-marketed 17

Sheila Scheuerman, Due Process Forgotten: The Problem of Statutory Damages and Class Actions, 74 Mo. L. Rev. 103 (2009) 13

IDENTITY OF THE *AMICI*[1]

Amici are associations of companies that constitute "consumer reporting agencies" under the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.* They provide pre-employment, tenant, and mortgage credit reports to employers, lenders, and landlords of all shapes and sizes.

The **National Consumer Reporting Association** (NCRA), is a national trade organization of consumer reporting agencies and associated professionals that provide products and services to credit grantors, employers, landlords and all types of general businesses. NCRA's membership includes 70 percent of the mortgage credit reporting agencies in the United States that can produce a credit report meeting Fannie Mae, Freddie Mac and HUD requirements for mortgage lending.

The **National Association of Professional Background Screeners** (NAPBS), an association of nearly 700 employment and tenant background

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[1] Counsel of record for all parties received 10 days' written notice of *amici* intent to file this brief, and they have consented thereto. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. In addition, no person or entity other than *amici* made a monetary contribution intended to fund the preparation or submission of this brief.

screening firms. Its members verify educational and employment history, and search publicly available criminal background information from state, federal and international sources in order to enable employers and landlords to provide their customers with safe places to live and work. NAPBS's members are both large and small businesses.

PreCheck is an industry accredited, national background screening company that focuses on the needs of healthcare employers. In accordance with the Fair Credit Reporting Act, PreCheck performs pre-employment screening of doctors, nurses, hospital staff, and healthcare workers involved in providing patient care at all levels. Through its compliance education programs of staff and clients and solutions for license monitoring and drug testing, PreCheck is committed to patient safety.

SUMMARY OF ARGUMENT

Amici and, as applicable, their members are all entities regulated by the Fair Credit Reporting Act, and are primarily involved in three general regulated activities: (1) pre-employment screening; (2) mortgage credit; and (3) tenant screening. In this case, the Ninth Circuit decided that a class plaintiff who files a lawsuit under the Fair Credit Reporting Act alleging nothing more than a statutory violation has satisfied the case or controversy requirement of Article III, even in the absence of allegations of particularized harm to a consumer. In addition to splitting the Circuits, that rule has caused and will continue to cause harm to *amici's* nationwide activities.

When this Court recently clarified pleading standards under the Rules of Civil Procedure, it remarked on the prospect of unfair *in terrorem* settlements and an unwieldy discovery process as reasons for trial courts to ensure that the specific facts pled in a complaint support the claimed wrong. *Amici* submit that the same harm occurs through class-action suits that lack allegations of particularized harm. *Amici* face a practical reality in which ruinous potential liability and litigation expense grossly outweighs any harm actually caused to consumers, and are seeing an increasing number of class action in which the plaintiffs have suffered no injury whatsoever. That exposure and expense is not limited to the largest entities: it has spread to small and mid-size businesses.

Amici do not gainsay the general societal interest in law enforcement, or the need to ensure that consumers harmed by illegal action are fairly compensated. Where that harm exists, Article III standing is of course entirely appropriate, and the courts should remedy those wrongs. In the absence of a case or controversy, the government, through agency and Executive Branch enforcement, can, should and do vindicate the broader societal interest in legal compliance. By permitting consumers to vindicate that generalized interest in the absence of injury-in-fact, the Ninth Circuit rule violates the constitution and should be reversed.

ARGUMENT

I. PERMITTING SUITS TO GO FORWARD IN THE ABSENCE OF INJURY-IN-FACT CREATES AN INHERENT PROCEDURAL UNFAIRNESS AGAINST CLASS-ACTION DEFENDANTS

The Ninth Circuit found that merely alleging a "willful" violation of the Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681 *et seq.*, creates injury-in-fact to a consumer, and grants that consumer Article III standing under the FCRA. Pet. App. at 8a. As the petition spells out in some detail, the Courts of Appeal have irreconcilably split on whether a technical statutory violation can confer Article III standing in the absence of particularized harm. Pet. 9-11. *Compare, e.g.*, Pet App. at 8a with *David v. Alphin*, 704 F.3d 327, 337-38 (4th Cir. 2013) (rejecting the standing argument based on breach of statutory duty without concomitant showing of harm).

Article III standing requires the plaintiff to have suffered "an injury in fact—an invasion of a legally protected interest which is (a) concrete or particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (internal quotation and citations omitted). In addition, the plaintiff must show a "causal connection between the injury and the conduct complained of" that is "fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." *Id.* (internal citation and

editing omitted). As standing allegations are "not mere pleading requirements, but rather an indispensible part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof." *Id.* at 561.

Amici are writing to emphasize the negative nationwide effects of the Ninth Circuit rule on their industry, all of which is regulated by the FCRA. The prevalence of FCRA class actions in the absence of sufficiently pled harm creates the same undesirable results that this Court recognized and sought to prevent in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559 (2007) ("the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings"); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 684 (2009) (clarifying that *Twombly*'s concerns over unruly discovery and *in terrorem* settlements are not limited to antitrust suits). By permitting FCRA cases to go forward based only on an unadorned statement of a statutory violation, the Ninth Circuit rule opens *amici's* members to *in terrorem* settlement of these claims as a "partial downside insurance policy." *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 347-48 (2006); *see also Twombly*, 550 U.S. at 557-58.

In the absence of this Court's grant of the petition and reversal of the Ninth Circuit decision, *amici* fully expect continued growth in the number of "bare allegation" suits. FCRA litigation of this kind has become an industry unto itself, leaving *amici's* members with two unappetizing choices. They may

either settle the case based on creation of a class that has never been directly harmed by their activity, and be done with the liability, or they can litigate these marginal claims, endure a discovery process involving potentially millions of consumers--a process that the courts have acknowledged can barely be controlled, *see Iqbal*, 556 U.S. at 684-85, and risk liability that bankrupts the company. The choice to settle is not a hard one. *Amici's* members have seen steady increases in their errors and omissions insurance from year to year as these cases become more prolific, and some insurers have ceased offering FCRA coverage altogether.[2] Meanwhile, the number of FCRA class actions and plaintiffs' counsel solely dedicated to these claims continues to increase rapidly. In short, the floodgates are more than ajar; *amici* urge this Court to dam them before the industry drowns.

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[2] *See* Justin F. Lavella & John W. McGuiness, *Insurance Coverage in Consumer Class Actions*, Corp. Couns., Oct. 2010, at 7, 8 (noting that "insurers have begun adding to policies exclusions specifically tailored to eliminate coverage," that many "CGL policies contain an exclusion that bars coverage for claims arising from the 'distribution of material in violation of statutes,'" and that "other insurers have been more direct by expressly excluding coverage for claims seeking damages under specific consumer protections statutes such as CAN-SPAM, FACTA, and FCRA").

II. THE NINTH CIRCUIT RULE MAKES IT UNECONOMIC TO CONTEST BARE STATUTORY VIOLATIONS OF THE FAIR CREDIT REPORTING ACT

Amici's members are "consumer reporting agencies" and the FCRA extensively regulates their activities. The FCRA's stated purpose is to encourage the reporting of accurate consumer information in a manner that provides for fairness, impartiality, and efficiency in the banking system while respecting the consumer's right to privacy. *See* 15 U.S.C. § 1681. The statute's actual reach is a bit broader: it regulates the activities of a "consumer reporting agency," namely, "any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating information on consumers for the purpose of furnishing consumer reports to third parties." 15 U.S.C. § 1681a(f). A "consumer report," in turn, consists of any communication by a consumer reporting agency "bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, or mode of living which is used or expected to be used ... for credit or insurance[,] employment purposes, or any other purpose authorized [by the statute]." 15 U.S.C. §§ 1681a(d)(1)(A)-(C).

The statute places several obligations on consumer reporting agencies (CRAs). A CRA may only provide consumer reports for certain enumerated purposes: most notably employment, housing, lending, and insurance. *See* 15 U.S.C. §

1681b *et seq.* When preparing those reports, CRAs have a general obligation to "follow reasonable procedures to assure maximum possible accuracy," 15 U.S.C. § 1681e(b). In addition, when reporting public record information (*e.g.*, criminal conviction information) for employment purposes, CRAs must maintain "strict procedures" ensuring that such information is complete or up to date, or notify the consumer when that information is being reported. 15 U.S.C. § 1681k(a)(2). When it creates a consumer report, the CRA must provide the report's user with a notice written by the Federal Trade Commission, which describes the user's obligations under the statute, and must obtain certifications from the user that the report will be used only for a permissible purpose. 15 U.S.C. §§ 1681e(a), (d).[3]

If negative information in the report results in an "adverse action" such as denial of a job, loan, or housing, then the user (*e.g.*, the employer, lender or landlord) must (a) cause the consumer to be notified that an adverse action may be taken with respect to their application because of information in the report; (b) provide the consumer with a "Summary of Rights" under the FCRA to dispute the information's accuracy; and (c) provide the consumer with the name of the CRA as well as a notice of the consumer's right to receive a free copy of their report from that CRA, and (d) inform the consumer of the

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[3] A similar notice must be sent to the furnisher of certain information to the CRA that describes that furnisher's obligations. 15 U.S.C. § 1681e(d).

right to dispute the information that the CRA provided. 15 U.S.C. §§ 1681m(a), 1681g(c). If the consumer disputes the report's accuracy, the statute requires the CRA to re-investigate and resolve that dispute within thirty days. 15 U.S.C. § 1681i(a)(1). In the event that the disputed information cannot be confirmed, it must be deleted from the consumer's file, and can only be re-inserted upon a certification of accuracy provided by the information's furnisher. 15 U.S.C. § 1681i(a)(5). If an employer or other user takes adverse action based on the consumer report, the user must provide the consumer with a final notice of adverse action. *See* 15 U.S.C. § 1681m(a).[4]

A negligent violation of the statute results in liability to each affected consumer for actual damages, costs and attorneys fees. 15 U.S.C. § 1681o. For willful violations, a consumer may obtain "any actual damages sustained by the consumer as a result of the failure [to comply with the FCRA] or damages of not less than $100 and not more than $1000." 15 U.S.C. § 1681n(a)(1)(A). Punitive damages are also available for willful violations. 15 U.S.C. § 1681n(a)(2). A number of government

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[4] The statute contains a number of technical requirements. *E.g.*, 15 U.S.C. § 1681c(f) (indication of dispute in consumer's file); 15 U.S.C. § 1681g(c)(2) (requiring disclosure of summary of rights when consumer report disclosed to consumer); 15 U.S.C. § 1681h(c) (requiring that trained personnel to explain information in consumer report); 15 U.S.C. § 1681i(a)(1)(A) (requiring CRAs to conduct a "reasonable" reinvestigation in the event of a consumer dispute).

agencies may bring suit to enforce the FCRA, including the Federal Trade Commission, the Consumer Financial Protection Bureau, as well as state attorneys general. *See e.g.*, 15 U.S.C. §§ 1681s (a)-(c); 12 U.S.C. § 5481(12)(F) (defining "enumerated consumer laws" to include FCRA); 12 U.S.C. § 5564(g) (describing the Bureau's litigation authority). The FCRA also recognizes that several states have their own fair credit reporting laws. *See e.g.*, 15 U.S.C. § 1681t (listing specific state laws immune from preemption).

A. *Amici's* Members Make Extensive Efforts to Comply With the Law

Amici's members operate mainly in three fields: (1) pre-employment criminal background screening; (2) tenant screening; and (3) credit screening for residential mortgages. Although *amici* have large members, a majority of their members are small and mid-size businesses. *Amici* exist in substantial part to educate their members on FCRA compliance, a formidable task given its "less-than-pellucid statutory text." *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 70 (2007). For example, *amicus* NAPBS not only develops and promotes best practices for its members, but also accredits screening companies that demonstrate compliance with high standards of operation as prescribed by its industry accreditation program. In addition, *amici* devote substantial efforts to educating their members and employees not only through continuing legal education and compliance seminars, but also by inviting their regulators to discuss that regulator's priorities and advise the industry about practices the

regulator would like to see ceased or expanded. *Amici's* members spend millions of dollars on FCRA compliance every year and market that compliance as a reason for employers, landlords and others to use their services.

The industry emphasis on FCRA compliance results from direct legal responsibility and desired market advantage, and serves to minimize errors in consumer reporting. Nonetheless, no matter how extensive, industry compliance efforts cannot change the reality that background and credit screening is a business run by human beings and even an individual exercising reasonable care can make a mistake. The FCRA's provisions contemplate the presence of inaccuracies, and provide means to correct them.[5] Under the Ninth Circuit rule, all it takes is one technical mistake to bankrupt a company.

For example, a midsize background screening company might run about one million checks per year, retaining those records for five years on five million total consumers. A five-employee screening company might run about 5,000 checks per year, and retain records on 25,000 total consumers. The

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[5] The FCRA acknowledges this reality--most notably by 15 U.S.C. § 1681i, "Procedure in case of disputed accuracy". The dispute and reinvestigation process provides a CRA an opportunity to cure inaccuracies. *See also, e.g.*, 15 U.S.C. § 1681o (imposing liability for negligent noncompliance, not strict liability for violations of the statute).

midsize company stares down the barrel of a $5 billion maximum liability with a minimum liability of half a billion dollars. The smaller company faces an equally devastating $2.5 million liability on the low end, and $25 million on the high end. The liability on either end of the spectrum is ruinous. The statutory damages far exceed the net worth—or indeed the total assets—of these kinds of companies, and well out of proportion to any harm actually caused to consumers. No matter what their size, however, the crippling liability that *amici's* members face under "bare allegation" FCRA suits renders defense of them an economic gamble.

B. The Ninth Circuit Rule Forces *Amici's* Members to Pay for Harm that They Did Not Cause

As certain commentators noted, the structure of the FCRA created a target-rich environment for class-action attorneys: even the small chance of being found liable for multi-billion-dollar awards creates enormous incentives to settle litigation no matter how tenuous the plaintiff's claim.[6] The class-

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[6] *See generally* Sheila Scheuerman, *Due Process Forgotten: The Problem of Statutory Damages and Class Actions*, 74 Mo. L. Rev. 103, 104-06 (2009), *available at* http://scholarship.law.missouri.edu/cgi/viewcontent.cgi?article=3812&context=mlr (discussing the ruinous potential of the $100 to $1000 statutory damages under the Fair and Accurate Credit Transactions Act); David L .Permut and Tamra T. Moore, Recent Developments in Class Actions: The Fair Credit

action bar has taken note: according to this Court's own reports, filings of cases involving consumer credit statutes, including the FCRA, increased by 53 percent in 2009.[7] Five years later, *amici*'s members are finding that where once only the large firms were targeted, smaller firms now appear in the crosshairs on truly questionable grounds.[8]

For example, one of *amici*'s members currently faces a class-action suit arising from an alleged failure to provide statutory notices under 15 U.S.C. § 1681g(c)(2), *even though the defendant had no information on the plaintiff and never ran a consumer report on him.* Class Complaint ¶¶ 26-33, *Henderson v. InfoMart,* Inc., No. 3:13-cv-00578 (E.D. Va. Aug. 26, 2013) (alleging violation of 15 U.S.C. § 1681g (c)(2)); *see also* Class Complaint ¶¶ 24-30, 61-70, *Henderson v. First Advantage Background Servs. Corp.*, No. 3:14-cv-00221 (E.D. Va. Mar. 24, 2014) (alleging violation of FCRA based on failure by CRA to provide notice even though the CRA had no

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Reporting Act, 61 Bus. L. 931 (2006) (discussing FCRA damages in a class action context).

[7] 2009 Year-End Report on the Federal Judiciary, at 3, http://www.supremecourt.gov/publicinfo/year-end/2009year-endreport.pdf

[8] A noted class action attorney went as far as to tell one of *amici*'s members that he has a "punch list" of *amici*'s members from big to small, and was gradually working his way through it. *Amici* take him at his word.

information about the consumer).[9] Similarly, another CRA faces a class action on the basis that it did not adequately obtain certifications from *employers* that the consumer report would be used for employment purposes, even though that is the *only* purpose for which the class plaintiff's report was used. Class Action Complaint ¶¶ 3, 21-26, *Lozano-Rivera v. Universal City Nissan*, No. 2:14-cv-01010 (C.D. Cal. Feb. 10, 2014) (alleging violations of 15 U.S.C. § 1681b(b)(2)(a)). Still another complaint involves allegations not that the plaintiffs were injured by the inaccuracy of criminal record information in their reports, but simply that they were not told about the fact that the employer was considering not hiring them because of it. *See* Class Action Complaint ¶¶ 42-60, *Henderson v. Wal-Mart*, No. 3:14-cv-208 (E.D. Va. Mar. 24, 2014). Here, the class plaintiff relies on the "anxiety" caused by the presence of inaccurate (but generally flattering) information about him in petitioner's database, absent any evidence that that information has been transmitted to anyone other than himself. First Amended Complaint ¶¶ 32,37, *Robins v. Spokeo, Inc.*, No. 2:10-cv-05306 (C.D. Ca. Feb. 17, 2011).

In these "bare violation" cases, a plaintiff's injury-in-fact improperly depends "on the

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[9] It should be noted that another class representative in *InfoMart*, Mr. Woods, based his claim on the fact that he had a dispute with the CRA; the CRA fixed the erroneous information, and he was permitted to go on a field trip with his daughter. Class Complaint, *InfoMart*, *supra* p. 14, at ¶¶ 51-56.

independent action of some third party not before the court." *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1972). Thus, for example, in *InfoMart, supra,* the alleged failure to provide a notice never resulted in *any* adverse action as the CRA never issued a report about the consumer. The allegations in *Lozano-Rivera, supra*, suffer a similar defect: a consumer has complained about the lack of certifications between an employer and the CRA, in the absence of any causal connection to him. In this case, there is no allegation that any employer, insurer, or lender has taken any action with respect to respondent that has specifically harmed *him*. The strength of such claims is entirely irrelevant; the stakes render the legality of these practices functionally indefensible, and the liability has to be paid off.

C. Agency Enforcement of the FCRA Vindicates the Public Interest in Technical Compliance

To be clear, Petitioner's alleged conduct will receive no praise from *amici*. But Petitioner hardly got away with it: *amici* note that Petitioner was investigated by and settled with the Federal Trade Commission over the very same activity alleged in the complaint.[10] In the absence of concrete,

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[10] *See* Press Release, FTC, Spokeo to Pay $800,000 to Settle FTC Charges Company Allegedly Marketed Information to Employers and Recruiters in Violation of FCRA (June 12, 2012), *available at* http://www.ftc.gov/news-events/press-

particularized injury, that investigation and settlement vindicated the public interest in petitioner's FCRA compliance. *See, e.g.*, 15 U.S.C. §§ 1681s(a), (b), (c)(1), (c)(2) (providing enforcement authority to Federal Trade Commission, multiple agencies, and state attorneys general); 12 U.S.C. § 5564 (describing CFPB litigation authority). Moreover, to the extent any consumer actually *was* hurt by Petitioner's transmission of inaccurate information by, for example, losing a job for which she was otherwise qualified, *amici* do not contest that that consumer and all others similarly situated would have suffered an injury-in-fact, have standing to sue, and should be fairly compensated for that injury. In that kind of case, *amici* suggest that the FCRA's statutory damage provisions create a range from which damages can be awarded in cases where they cannot be accurately quantified. *See Dowell v. Wells Fargo Bank, NA*, 517 F.3d 1024, 1026 (8th Cir. 2008) (per curiam) (noting that a reasonable reading of the statute could require that plaintiff show some actual damage in order to make statutory damages available). The threshold injury-in-fact, however, is missing not only from this case, but every case in which *amici*'s members face suits based on a technical statutory violation.

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releases/2012/06/spokeo-pay-800000-settle-ftc-charges-company-allegedly-marketed.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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SPOKEO, INC.,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICI CURIAE NEW ENGLAND LEGAL FOUNDATION AND ASSOCIATED INDUSTRIES OF MASSACHUSETTS IN SUPPORT OF PETITIONER

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Dated: June 6, 2014

BATEMAN & BLADE, INC. BOSTON, MASSACHUSETTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 3

ARGUMENT 6

I. THIS COURT SHOULD GRANT CERTIORARI AND DECIDE THAT AN INDIVIDUAL WHO ALLEGES THE VIOLATION OF A FEDERAL STATUTE WITHOUT ALLEGING ANY RESULTING CONCRETE HARM HAS NO STANDING TO SUE IN FEDERAL COURT, UNDER ARTICLE III OF THE UNITED STATES CONSTITUTION. 6

A. The Violation Of A Statutory Right Is Not An Injury In Fact Under Article III Unless The Violation Has Caused The Plaintiff To Suffer A Concrete, *De Facto* Harm. 9

B. The Ninth Circuit Misinterpreted This Court's Key Precedent On Article III Standing And Thereby Conflated Statutory Standing With The Separate Requirement Of Constitutional Standing 12

C. By Conflating Statutory Standing With Constitutional Standing, The Ninth Circuit Abdicated The Judiciary's Power And Duty, Established In *Marbury v. Madison*, To Decide Whether A Federal Statutory Claim Comports With Article III..... 15

D. By Allowing An Uninjured Plaintiff To Enforce A Business's Statutory Duties In Court, The Ninth Circuit Intruded Upon The Exclusive Power Of The Executive Branch To Enforce The Law, In Violation Of The Separation Of Powers. 17

CONCLUSION 22

TABLE OF AUTHORITIES

CASES

Clapper v. Amnesty Int'l USA,
133 S. Ct. 1138 (2013) 7, 8

DaimlerChrysler Corp. v. Cuno,
547 U.S. 332 (2006) 18

Lewis v. Casey,
518 U.S. 343 (1996) 10, 12, 14, 18

Lexmark Int'l, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377 (2014) 10, 12

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992) ..... *passim*

Raines v. Byrd,
521 U.S. 811 (1997) 11, 12, 18

Robins v. Spokeo, Inc.,
742 F. 3d 409 (9th Cir. 2014) 8, 9, 12, 13

Steel Co. v. Citizens for a Better Env't,
523 U.S. 83 (1998) 10, 12, 19

Summers v. Earth Island Inst.,
555 U.S. 488 (2009) 10, 12

United States v. Windsor,
133 S. Ct. 2675 (2013) 7

Warth v. Seldin,
422 U.S. 490 (1975) 4, 5, 13, 14

STATUTES

15 U.S.C. § 1681 20

15 U.S.C. § 1681e(b) 9

15 U.S.C. § 1681n(a)(1)(A) 9, 11

15 U.S.C. § 1681n(a)(3) 9

15 U.S.C. § 1681s(a)(1) 21

15 U.S.C. § 1681s(b) 21

15 U.S.C. § 1681s(c)(1)(A) 21

15 U.S.C. § 1681s(c)(1)(B)(i) 21

CONSTITUTIONAL AND OTHER AUTHORITIES

U.S. Const. art. I, § 8 ..... 5, 12, 15

U.S. Const. art. II, § 3 ..... 1, 3, 6, 18

U.S. Const. art. III, § 2 ..... *passim*

Leonard & Joanne C. Brant, *The Half-Open Door: Article III, The Injury-In-Fact Rule, And The Framers' Plan For Federal Courts Of Limited Jurisdiction*, 54 Rutgers L. Rev. 1 (2001) 20

Michael E. Rosman, *Standing Alone under the Fair Housing Act*, 60 Mo. L. Rev. 547 (1995) 16

Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U. L. Rev. 881 (1983) 18

Craig A. Stern, *Another Sign From Hein: Does The Generalized Grievance Fail A Constitutional Or A Prudential Test Of Federal Standing To Sue?*, 12 Lewis & Clark L. Rev. 1169 (2008) 20

INTEREST OF AMICI CURIAE

Amici curiae New England Legal Foundation ("NELF") and Associated Industries of Massachusetts ("AIM") seek to present their views, and the views of their supporters, on whether certiorari should be granted to decide whether an individual who alleges the violation of a federal statute without alleging any resulting concrete harm has standing to sue in federal court, under Article III of the United States Constitution.[1]

NELF is a nonprofit, nonpartisan, public interest law firm, incorporated in Massachusetts in 1977, and headquartered in Boston. Its membership consists of corporations, law firms, individuals, and others who believe in NELF's mission of promoting balanced economic growth in New England, protecting the free enterprise system, and defending economic rights. NELF's members and supporters include both large and small businesses located primarily in the New England region.

AIM is a 99-year-old nonprofit association, with over 5,000 employer members doing business in the Commonwealth. AIM's mission is to promote the well-being of its members and their employees, and the prosperity of the Commonwealth of

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[1] Pursuant to Supreme Court Rule 37.6, amici state that no counsel for a party authored this brief in whole or in part, and no person or entity, other than amici, made a monetary contribution to the preparation or submission of the brief.

Pursuant to Supreme Court Rule 37.2(a), amici also state that all parties were provided with timely notice of intent to file this brief, and that counsel of record for all parties have consented to its filing. Copies of counsel's written consent are filed herewith.

Massachusetts, by improving the economic climate of Massachusetts, advocating fair and equitable public policy proactively, and by providing relevant and reliable information and excellent services.

Amici are committed to upholding the constitutional limits on the Federal Judiciary's subject matter jurisdiction, and to preserving the separation of powers among the three branches of government. Enforcement of those principles is especially important to amici when, as here, an uninjured plaintiff (and putative representative of a class of similarly uninjured individuals) seeks to impose liability on a business for a potentially large, aggregated award of statutory damages, and reasonable attorney's fees, based on allegations of a technical violation of a statute.

In this connection, amici filed a merits brief in this Court in *Edwards v. First American Corp.*, 610 F.3d 514 (9th Cir. 2010), *cert. granted*, 131 S. Ct. 3022 (2011), *cert. dismissed as improvidently granted*, 132 S. Ct. 2536 (2012). In *Edwards*, as in this case, amici argued that a plaintiff who alleges the violation of a federal statutory right without alleging any resulting "injury in fact" has no standing to sue in federal court, under Article III. Amici also argued in *Edwards*, as they do here, that Congress cannot manufacture the injury in fact necessary to satisfy Article III's case-or-controversy requirement, such as by providing a damages remedy for the bare violation of a statutory right. Instead, a statutory claim must redress a concrete, *de facto* harm to satisfy Article III. Amici are also committed to the related principle, argued in their *Edwards* brief, that the separation of powers should prevent an uninjured plaintiff and the Federal

Judiciary from enforcing general statutory duties, thereby usurping the exclusive law-enforcement powers of the Executive Branch, under Article II of the Constitution.

For these and other reasons discussed below, NELF and AIM believe that their brief will assist the Court in deciding whether to grant certiorari and determine whether a plaintiff who alleges the bare violation of a federal statutory right has established standing under Article III.

SUMMARY OF ARGUMENT

This Court should grant certiorari and decide that an individual who alleges the violation of a federal statute without alleging any resulting concrete harm--i.e. an "injury in fact--has no standing to sue in federal court, under Article III of the United States Constitution. The respondent has sued under the Fair Credit Reporting Act ("FCRA"), which provides a private damages remedy for a willful violation of that statute and does not require a showing of actual harm. Neither the statute nor the plaintiff here has identified any injury in fact resulting from the alleged statutory violation. Accordingly, certiorari should be granted to dismiss this matter.

Article III's standing requirement limits Congress to creating a private right of action that redresses an actual harm. Conversely, Article III prevents Congress from *manufacturing* an injury in fact, such as by providing a damages remedy for the technical violation of a statute under the FCRA. An injury in fact must exist apart from a federal statute and has nothing to do with the text of the statute.

In reaching its decision to the contrary, the Ninth Circuit erroneously conflated an "injury in law," or statutory standing, with an injury in fact, or constitutional standing. According to the Ninth Circuit, a plaintiff generally has Article III standing to enforce a statutory right whenever Congress says he does, and a court should defer to Congress's policy choice. In so holding, the lower court rendered virtually meaningless the independent constitutional requirement of injury in fact under Article III.

The Ninth Circuit erred chiefly by misinterpreting two key precedents of this Court discussing Article III standing. First, the lower court misconstrued language from *Warth v. Seldin*, 422 U.S. 490, 500 (1975) ("The injury required by Art[icle] III *may* exist solely by virtue of statutes creating legal rights, the invasion of which creates standing.") (citations and internal quotation marks omitted) (emphasis added). The lower court misinterpreted this language to mean that constitutional standing is virtually coextensive with statutory standing, and that a court need only consult the text of a statute to find an injury in fact.

Of course, *Warth* says no such thing. Such a reading would eliminate the injury-in-fact requirement altogether. As the Court subsequently explained in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 578 (1992), this language from *Warth* simply means that the violation of a statutory right *may* satisfy Article III standing, but only when the statutory violation has caused a concrete, *de facto* harm that exists independently of the statute– i.e., an injury in fact.

But the Ninth Circuit also misinterpreted this explanation of *Warth* in *Lujan*. The lower court misread the "concrete, *de facto* harm" discussed in *Lujan*--i.e., the injury-in-fact requirement under Article III--as merely requiring the plaintiff to establish a violation of a personal statutory right, as opposed to the violation of a statutory right belonging to the general public. According to the lower court, *Lujan* recognizes standing once the plaintiff has established the violation of such a personal statutory right. This is incorrect. Clearly, the Ninth Circuit omitted the crucial Article III requirement that the statutory violation must cause an actual injury to confer standing. Thus, the Ninth Circuit based its decision on its incomplete formulation of Article III standing under *Lujan*.

By conflating statutory standing with constitutional standing, the Ninth Circuit effectively abdicated the Federal Judiciary's independent power and duty to determine whether a federal statute comports with Article III, as established long ago in *Marbury v. Madison*, 1 Cranch 137, 2 L.Ed. 60 (1803). According to the Ninth Circuit, Congress is free to create Article III standing whenever it exercises its plenary powers under Article I, § 8 of the Constitution. A case or controversy is what Congress, and not the Judiciary, says it should be. In so deciding, the Ninth Circuit all but abandoned the injury-in-fact requirement, and with it the Federal Judiciary's exclusive institutional role to interpret and enforce the constitutional limits on a federal court's jurisdiction.

By conflating statutory standing with constitutional standing, the Ninth Circuit also violated the separation of powers, which is a cornerstone of this Court's Article III jurisprudence. In particular, the lower court, acting at the behest of Congress, allowed an uninjured plaintiff (and a putative representative of a class of similarly uninjured individuals), to proceed as if he were a "private attorney general" seeking to enforce the defendant's general duties under the FCRA. In so doing, the Ninth Circuit certainly exceeded the limits of its subject matter jurisdiction under Article III. But the lower court, acting with congressional approval, also intruded upon the exclusive and discretionary role of the Executive Branch to respond to the bare violation of a statute and "take Care that the Laws be faithfully executed " U.S. Const. art. II, § 3.

ARGUMENT

I. THIS COURT SHOULD GRANT CERTIORARI AND DECIDE THAT AN INDIVIDUAL WHO ALLEGES THE VIOLATION OF A FEDERAL STATUTE WITHOUT ALLEGING ANY RESULTING CONCRETE HARM HAS NO STANDING TO SUE IN FEDERAL COURT, UNDER ARTICLE III OF THE UNITED STATES CONSTITUTION.

At issue is whether this Court should grant certiorari to decide whether an individual who alleges the violation of a federal statute without alleging any resulting concrete harm--i.e. an "injury in fact"--has standing to sue in federal court, under

Article III of the United States Constitution.[2] Article III limits the Federal Judiciary's subject matter jurisdiction to "cases" and "controversies." And this Court has stated repeatedly that "Article III standing enforces the Constitution's case-or-controversy requirement." *United States v. Windsor*, 133 S. Ct. 2675, 2685 (2013) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559–562 (1992)). To establish Article III standing, the plaintiff must plead and prove an "injury in fact," i.e., "an injury [that] must be concrete, particularized, and actual or imminent . . ." *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013) (citation and internal quotation marks omitted).

Thus, the issue here is whether the bare violation of a statutory right, without more,

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[2] Article III provides, in relevant part:

> The judicial Power shall extend to all *Cases*, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all *Cases* affecting Ambassadors, other public Ministers and Consuls;—to all *Cases* of admiralty and maritime Jurisdiction;—to *Controversies* to which the United States shall be a Party;—to *Controversies* between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. Const. art. III, § 2 (emphasis added).

constitutes an injury in fact sufficient to satisfy Article III. The Ninth Circuit concluded that Article III standing is established under such circumstances. The Ninth Circuit has erred, and certiorari should be granted to correct the lower court's grave error.

The respondent and putative class representative, Thomas Robins, alleges that the petitioner, Spokeo, Inc., a website operator, has transmitted false (yet favorable) personal information about him on its website, such as by overstating his educational level and his financial status. *See Robins v. Spokeo, Inc.*, 742 F. 3d 409, 411 (9th Cir. 2014). Robins also alleges that Spokeo's transmittal of this information has harmed his employment prospects and has caused him anxiety. *See id.*[3]

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[3] The Ninth Circuit did not deem it necessary to reach these allegations of purported harm, because the lower court concluded that Robins had established an injury in fact merely by alleging a violation of his rights under the Fair Credit Reporting Act, 15 U.S.C. § 1681n(a)(1)(A). *See Robins*, 742 F. 3d at 414 n.3. Nevertheless, it should be noted that these allegations cannot establish an injury in fact because they are wildly speculative and subjective. In particular, they "rel[y] on a highly attenuated chain of possibilities" that is based impermissibly on "speculation about the decisions of independent actors[,]" such as prospective employers. *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1148, 1150 (2013). As such, these allegations "do[] not satisfy the [Article III] requirement that threatened injury must be *certainly impending* to constitute injury in fact." *Id.*, 133 S. Ct. at 1147 (citation and internal quotation marks omitted) (emphasis in original).

Robins sued Spokeo under § 1681n(a) of the Fair Credit Reporting Act, 15 U.S.C. §§ 1681-1681x ("FCRA"), which allows a plaintiff to recover statutory damages, along with costs and reasonable attorney's fees, from any consumer reporting agency that has "willfully fail[ed] to comply" with the FCRA with respect to that plaintiff. 15 U.S.C. § 1681n(a)(1)(A), (3).[4] The Ninth Circuit held that Robins has alleged an injury in fact under Article III because he has alleged a willful violation of his rights under the FCRA, and because § 1681n(a)(1)(A) "does not require a showing of actual harm when a plaintiff sues for willful violations." *Robins*, 742 F. 3d. at 412.

A. The Violation Of A Statutory Right Is Not An Injury In Fact Under Article III Unless The Violation Has Caused The Plaintiff To Suffer A Concrete, *De Facto* Harm.

The Ninth Circuit concluded that Article III is satisfied because Congress has treated a violation of the FCRA, by itself, as a compensable "harm" in federal court. *See Robins*, 742 F. 3d at 412. In short, the Ninth Circuit concluded that an "injury in law" under the FCRA is also an injury in fact under Article III.

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[4] Section 1681n(a)(1)(A) of the FCRA provides, in relevant part: "Any person who willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to . damages of not less than $100 and not more than $1,000. " 15 U.S.C. § 1681n (a)(1)(A). Section 1681n(a)(3), in turn, awards the successful plaintiff costs and reasonable attorney's fees.

The Ninth Circuit has erred, because the bare violation of a statutory right is not itself an injury in fact under Article III. "[T]he requirement of injury in fact is a hard floor of Article III jurisdiction that *cannot be removed by statute.*" *Summers v. Earth Island Inst.*, 555 U.S. 488, 497 (2009) (emphasis added). Instead, Article III requires the plaintiff to plead and prove that the statutory violation has caused him to suffer an actual harm, i.e., has made him worse off in some concrete, identifiable way. Simply put, the plaintiff must establish an "injury-in-fact *caused by the violation of [a] legal right.*" *Lewis v. Casey*, 518 U.S. 343, 353, n.4 (1996) (emphasis in original). *See also Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386 (2014) ("The plaintiff must have suffered or be imminently threatened with a *concrete and particularized* 'injury in fact' ") (emphasis added).

An injury in fact is therefore a concrete, *de facto* harm that exists in the real world and "has nothing to do with the text of the statute relied upon." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 97 (1998). Accordingly, Article III's standing requirement limits Congress to creating a private right of action that redresses an actual harm. "Congress[] [may] elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law " *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 578 (1992). Conversely, Article III prevents Congress from *manufacturing* an injury in fact, such as by providing a damages remedy for the technical violation of a statute under the FCRA. "It is settled

that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing ." *Raines v. Byrd*, 521 U.S. 811, 820 (1997).

In sum, Article III prevents Congress from creating a private remedy for a "harm" that resides solely within the language of a statute. In creating new statutory remedies, then, "Congress must at the very least *identify the injury* it seeks to vindicate . . . . [T]he party bringing suit must show that the action *injures him in a concrete and personal way*." *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring) (emphasis added).

In light of this clear precedent, the statutory right to recover damages for a bare violation of the FCRA cannot satisfy Article III. Accordingly, § 1681n(a)(1)(A) of the FCRA must fail Article III review because it allows a plaintiff such as Robins to recover damages without having to prove any injury in fact.[5] Nor has Robins alleged any such injury here.[6] Consequently, the Ninth Circuit should have dismissed Robins' claim for lack of standing. Certiorari should therefore be granted to correct the Ninth Circuit's error in finding constitutional standing when there was none to be found.

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[5] *See* n.4, above.

[6] *See* n.3, above.

B. The Ninth Circuit Misinterpreted This Court's Key Precedent On Article III Standing And Thereby Conflated Statutory Standing With The Separate Requirement Of Constitutional Standing.

In reaching its decision, the Ninth Circuit erroneously conflated an "injury in law," or statutory standing, with the "irreducible *constitutional* minimum of standing" under Article III. *Lexmark*, 134 S. Ct. at 1386 (citation and internal quotation marks omitted) (emphasis added). According to the Ninth Circuit, "the violation of a statutory right is usually a sufficient injury in fact to confer standing." *Robins*, 742 F. 3d at 412. In the Ninth Circuit's view, then, a plaintiff generally has Article III standing to enforce a statutory right whenever Congress says he does, and a court should defer to Congress's policy choice. *See id.*, 742 F. 3d at 413.

In so holding, the lower court rendered virtually meaningless the independent constitutional requirement of injury in fact under Article III. If the Ninth Circuit were correct, then there would be no constitutional limits to Congress's expansion of the Federal Judiciary's jurisdiction, other than Congress's broad, plenary powers to legislate under Article I, § 8. The Ninth Circuit's decision plainly contravenes this Court's oft-repeated statement that injury in fact is a "hard floor" requirement of Article III standing that Congress can neither eliminate nor manufacture. *See Summers*, 555 U.S. at 497; *Citizens for a Better Env't*, 523 U.S. at 97; *Raines*, 521 U.S. at 820; *Lewis*, 518 U.S. at 353 n.4.

In particular, the Ninth Circuit went astray in its opinion when it misinterpreted two key precedents of this Court discussing Article III standing. First, the lower court misconstrued language from *Warth v. Seldin*, 422 U.S. 490 (1975), in which the Court stated that "'[t]he actual or threatened injury required by Art[icle] III *may* exist solely by virtue of statutes creating legal rights, the invasion of which creates standing.'" *Robins*, 742 F. 3d at 412 (quoting *Warth*, 422 U.S. at 500) (citations and internal quotation marks omitted) (emphasis added). *See also Robins*, 742 F. 3d at 412 (citing *Edwards v. First Am. Corp.*, 610 F. 3d 514, 517 (9th Cir. 2010), *cert. granted*, 131 S. Ct. 3022 (2011), *cert. dismissed as improvidently granted*, 132 S. Ct. 2536 (2012) (discussing *Warth*)).

The Ninth Circuit mistook this language from *Warth* to mean that constitutional standing is virtually coextensive with statutory standing, and that a court need only consult the text of a statute to find an injury in fact. *See Robins*, 742 F. 3d at 412 (citing *Edwards*, 610 F. 3d at 517). Of course, *Warth* says no such thing. Such a reading would eliminate the injury-in-fact requirement altogether. As the Court subsequently explained in *Lujan*, this "invasion of rights" language from *Warth* simply means that the violation of a statutory right *may* satisfy Article III standing, but only when the statutory violation has caused a concrete, *de facto* harm that exists independently of the statute–i.e., an injury in fact. *See Lujan*, 504 U.S. at 578 (Article III permits "Congress [to] elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law ."). *See also id.* (discussing two prior Court decisions

illustrating Article III requirement that federal statutory violation must cause plaintiff actual harm).

But the Ninth Circuit compounded its error by misinterpreting this very explanation of *Warth* that the Court provided in *Lujan*. In particular, the lower court misread the "concrete, *de facto* harm" discussed in *Lujan*–i.e., the injury-in-fact requirement under Article III–as merely requiring the plaintiff to establish the violation of a personal statutory right, as opposed to the violation of a statutory right belonging to the general public. *See Robins*, 742 F. 3d at 413. According to the lower court, *Lujan* and Article III are satisfied once the plaintiff has established the violation of such a personal statutory right.

This is incorrect. Clearly, the Ninth Circuit omitted the crucial Article III requirement that the statutory violation must cause an actual injury to confer standing. Thus, the Ninth Circuit based its decision on its incomplete formulation of Article III standing under *Lujan*. To be sure, the plaintiff who brings a statutory claim must allege the violation of a personal statutory right to establish Article III standing. But that plaintiff must *also* allege that the statutory violation caused him to suffer a concrete, identifiable harm. *See Lewis*, 518 U.S. at 353 n.4; *Lujan*, 504 U.S. at 578.

In short, the lower court all but eliminated the injury-in-fact requirement when it misinterpreted both *Warth* and *Lujan*. Certiorari should therefore be granted to correct the Ninth Circuit's

misinterpretation of this Court's key Article III precedent and restore the constitutional limits to the Federal Judiciary's subject matter jurisdiction.

C. By Conflating Statutory Standing With Constitutional Standing, The Ninth Circuit Abdicated The Judiciary's Power And Duty, Established In *Marbury v. Madison*, To Decide Whether A Federal Statutory Claim Comports With Article III.

By conflating statutory standing with constitutional standing, the Ninth Circuit abdicated the Federal Judiciary's independent power and duty to determine whether a federal statutory claim comports with Article III, as established famously in *Marbury v. Madison*, 1 Cranch 137, 177, 2 L.Ed. 60 (1803) (invalidating federal statute conferring original jurisdiction on the Court over subject matter not authorized by Article III–i.e., issuance of writ of mandamus to compel public officer to deliver Presidential commission).

According to the Ninth Circuit, Congress is free to create Article III standing whenever it exercises its plenary powers under Article I, § 8 of the Constitution. Under this view, a case or controversy under Article III is simply what Congress says it should be. If Congress has provided a private remedy for the bare violation of a statutory right, as in the FCRA, then the injury-in-fact requirement is satisfied. Following the lower court's approach, then, federal courts should defer to Congress, and not to the Constitution, to define the

outer limits of their jurisdiction. Under such a view, however, Article III's limits are no more. *See* Michael E. Rosman, *Standing Alone under the Fair Housing Act*, 60 Mo. L. Rev. 547, 578 (1995) ("[I]f Congress . . . creates a legal right the violation of which will meet the injury 'in fact' requirement, it can indeed abrogate the Article III minima because the Court will not examine the factual existence of an 'injury' beyond the violation of a legal right.") (internal quotation marks omitted).

In so deciding, then, the Ninth Circuit virtually abandoned the injury-in-fact requirement, and with it the Federal Judiciary's institutional role to interpret and enforce the Constitution–i.e., to "say what the law is" under the Constitution and then hold the other branches of government accountable to this supreme document:

> The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written . [as] the fundamental and paramount law of the nation. It is emphatically the *province and duty of the judicial department to say what the law is.* . This is of the very essence of judicial duty. [I]f the legislature shall do what is expressly forbidden [by the Constitution], [i]t would be giving to the legislature a practical and real omnipotence .

Marbury, 1 Cranch at 176-78 (emphasis added).

In short, it is the Federal Judiciary, and not Congress, that has the power and the duty to decide whether a federal statutory claim satisfies the injury-in-fact requirement under Article III. After all, "there is an outer limit to the power of Congress to confer rights of action[, which] is a direct and necessary consequence of the case and controversy limitations found in Article III." *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring). *See also id.* at 580-81 (noting "that it would exceed those [Article III] limitations if, at the behest of Congress and in the absence of any showing of concrete injury, we were to entertain citizen suits to vindicate the public's nonconcrete interest in the proper administration of the laws.").

Certiorari should therefore be granted to enforce this fundamental principle of judicial review, established in *Marbury v. Madison*, and dismiss the respondent's claim for lack of standing.

D. By Allowing An Uninjured Plaintiff To Enforce A Business's Statutory Duties In Court, The Ninth Circuit Intruded Upon The Exclusive Power Of The Executive Branch To Enforce The Law, In Violation Of The Separation Of Powers.

The Ninth Circuit, acting at the behest of Congress, allowed Robins, an uninjured plaintiff (and a putative representative of a class of similarly uninjured individuals), to proceed in federal court as if he were a "private attorney general" seeking to enforce Spokeo's general duties under the FCRA. In so doing, the Ninth Circuit certainly exceeded the

limits of its subject matter jurisdiction under Article III. But the lower court, acting with congressional approval, also intruded upon the exclusive and discretionary role of the Executive Branch to respond to the bare violation of a federal statute and "take Care that the Laws be faithfully executed . " U.S. Const. art. II, § 3.

In so doing, the Ninth Circuit offended the separation of powers, the system of checks and balances among the three branches of federal government that has been a cornerstone of the Court's Article III jurisprudence. "[T]he law of Article III standing is built on a single basic idea--the idea of separation of powers[--] th[e] overriding and time-honored concern about keeping the Judiciary's power within its proper constitutional sphere ." *Raines*, 521 U.S. at 820 (internal quotation marks omitted). *See also DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006) ("This Court has recognized that the case-or-controversy limitation is crucial in maintaining the tripartite allocation of power set forth in the Constitution.") (citation and internal quotation marks omitted).[7]

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[7] *See also Lewis*, 518 U.S. at 353 n.3 ("[T]his [Article III standing] doctrine has a separation-of-powers component, which keeps courts within certain traditional bounds vis-à-vis the other branches That is where the 'actual injury' requirement comes from."); *Lujan*, 504 U.S. at 559-560 ("[T]he Constitution's central mechanism of separation of powers depends largely upon common understanding of what activities are appropriate to legislatures, to executives, and to courts."); Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U. L. Rev. 881, 897-98 (1983) ("[S]tanding and separation of powers are

In particular, the separation of powers limits the Federal Judiciary to its proper role under Article III--to adjudicate live disputes involving a party who has suffered, or is likely to suffer, a concrete harm. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102 n.4 (1998) ("The courts must stay within their constitutionally prescribed sphere of action, whether or not exceeding that sphere will harm one of the other two branches."). But the separation of powers also prevents the Judiciary from encroaching upon the exclusive and discretionary law-enforcement powers of the Executive Branch under Article II. *See id.*, 523 U.S. at 102 n.4 (discussing "the more specific separation-of-powers concern" that a statutory claim may "interfere[] with the Executive's power to 'take Care that the Laws be faithfully executed,' Art. II, § 3 ") (citation and internal quotation marks omitted).

Here, the separation of powers is violated in both ways. First, the Ninth Circuit exceeded Article III's case-or-controversy limitation by granting standing to a plaintiff who has not alleged an injury in fact. And, in so doing, the lower court also allowed an uninjured plaintiff, potentially representing a class of similarly uninjured individuals, to enforce Spokeo's general duties under the FCRA. In effect, the lower court, acting at the behest of Congress, treated the respondent as if he were an agent of the Executive Branch, seeking to vindicate the public interest in maintaining the accuracy of information provided by credit reporting

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intimately related. And the essential element that links the two [is] the requirement of *distinctive* injury not shared by the entire body politic . . . .") (emphasis in original).

agencies that are regulated by the FCRA. *See* 15 U.S.C. § 1681 ("Congressional findings and statement of purpose").

However, "[v]indicating the *public* interest is the function of Congress and the Chief Executive[,]" and *not* the Judiciary. *Lujan*, 504 U.S. at 576 (emphasis in original). *See also* Craig A. Stern, *Another Sign From Hein: Does The Generalized Grievance Fail A Constitutional Or A Prudential Test Of Federal Standing To Sue?*, 12 Lewis & Clark L. Rev. 1169, 1193 (2008) ("Article II forbids private exercise of federal executive power as much as judicial exercise of federal executive power. If an *uninjured plaintiff* were to bring an action that rightfully must be brought only by the executive power, the court would be countenancing a violation of Article II.") (emphasis added). In this light, then, the Ninth Circuit violated the separation of powers by allowing an uninjured private party to enlist the Federal Judiciary in exercising the exclusive law-enforcement power of the Executive Branch.

To be sure, the Judiciary's proper exercise of its powers under Article III does involve enforcement of the law. But such enforcement is only incidental and necessary to providing the injured party with a remedy to redress a concrete harm. "[C]ourts are permitted to interfere in executive processes only to the extent necessary to vindicate individual rights but no more." James Leonard & Joanne C. Brant, *The Half-Open Door: Article III, The Injury-In-Fact Rule, And The Framers' Plan For Federal Courts Of Limited Jurisdiction*, 54 Rutgers L. Rev. 1, 85 (2001) (discussing *Marbury*).

In this case, however, the Ninth Circuit enforced an *uninjured* party's statutory rights. In so doing, the lower court intruded upon the exclusive power of the Executive Branch to enforce the law. *See Lujan*, 504 U.S. at 576.[8] Certiorari should therefore be granted to redress this institutional wrong and restore the separation of powers embodied in the Constitution.

In sum, injury in fact is the irreducible constitutional minimum for federal jurisdiction over a claim. Statutory standing is not coextensive with this independent requirement of constitutional standing under Article III. Therefore, a plaintiff has no Article III standing to sue in federal court unless he alleges and proves that the defendant's violation of his statutory rights has caused him actual harm. Neither the FCRA nor Robins' allegations here have identified any such concrete harm. Certiorari should therefore be granted to dismiss this matter.

---

[8] In this connection, it should be noted that the FCRA provides for broad administrative enforcement of the statute, at both the federal and state levels. For example, the Federal Trade Commission ("FTC") and other federal agencies are empowered to investigate and enforce the FCRA, and to seek civil penalties against the infringing business. 15 U.S.C. § 1681s (a)(1), (a)(2)(A), (b). Moreover, the FCRA provides that any violation of a consumer's rights thereunder shall constitute an unfair or deceptive act or practice in commerce, in violation of the Federal Trade Commission Act, 15 U.S.C. § 45(a), and is enforceable by the FTC under that statute. 15 U.S.C. § 1681s(a)(1). Finally, the FCRA authorizes a state's law enforcement agencies to investigate and enforce consumers' FCRA rights, and obtain injunctive and monetary relief in state or federal court. *Id.* at § 1681s(c)(1)(A), (c)(1)(B)(i).

CONCLUSION

For the reasons stated above, amici respectfully request that this Court grant the petition for certiorari.

Respectfully submitted,

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AMICUS CURIAE BRIEF

Supreme Court, U.S.
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No. 13-1339

In the
Supreme Court of the United States

SPOKEO, INC.,

Petitioner,

v.

THOMAS ROBINS, individually and on behalf of all others similarly situated,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether Congress may confer Article III standing upon a plaintiff who suffers no concrete harm, and who therefore could not otherwise invoke the jurisdiction of a federal court, by authorizing a private right of action based on a bare violation of a federal statute.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
INTEREST OF AMICUS CURIAE	1
INTRODUCTION AND SUMMARY OF REASONS FOR GRANTING THE PETITION	2
REASONS FOR GRANTING THE PETITION FOR A WRIT OF CERTIORARI	3
I. THE QUESTION PRESENTED IS ONE OF RECURRING IMPORTANCE NATIONWIDE	3
II. WHETHER ARTICLE III STANDING REQUIREMENTS APPLY TO NON-INJURY CLASS ACTIONS DETERMINES THE EXTENT TO WHICH FEDERAL COURTS ARE MADE COMPLICIT IN CLASS ACTION ABUSES	9
CONCLUSION	14

TABLE OF AUTHORITIES

	Page
Cases	
Albert v. Trans Union Corp., 346 F.3d 734 (7th Cir. 2003)	9
Allen v. Wright, 468 U.S. 737 (1982)	4
American Federation of Labor v. American Sash and Door Co., 335 U.S. 538 (1949)	13
Arizona Christian School Tuition Organization v. Winn, 131 S. Ct. 1436 (2011)	3-4
AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011)	11
Bennett v. Spear, 520 U.S. 154 (1997)	1
Castano v. American Tobacco Co., 84 F.3d 734 (5th Cir. 1996)	11
Channell v. Citicorp Nat. Svcs. Inc., 89 F.3d 379 (7th Cir. 1996)	5
Charvat v. First Nat. Bank of Wahoo, No. 8:12-cv-97 2012 WL 2016184 (D. Neb. June 4, 2012)	8
Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138 (2013)	4, 7
Colby v. Publix Super Markets, Inc., 2012 WL 2357745 (N.D. Ala. June 15, 2012)	7-8
Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978)	11
David v. Alphin, 704 F.3d 327 (4th Cir. 2013)	5-6

TABLE OF AUTHORITIES—Continued

	Page
First American Financial Corp. v. Edwards, 132 S. Ct. 2536 (2012)	1, 7-8
Glus v. Brooklyn Eastern Dist. Terminal, 359 U.S. 231 (1959)	3
Grant ex rel. Family Eldercare v. Gilbert, 324 F.3d 383 (5th Cir. 2003)	10
Hamilton v. Texas, 498 U.S. 908 (1990)	3
Harris v. Mexican Specialty Foods, Inc., 564 F.3d 1301 (11th Cir. 2009)	1
In re Trans Union Corp. Privacy Litig., 211 F.R.D. 328 (N.D. Ill. 2002)	9
Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA, et al., 559 U.S. 573 (2010)	12
Kedziora v. Citicorp Nat. Svcs., Inc., 901 F. Supp. 1321 (N.D. Ill 1995)	5
Lewis v. Casey, 518 U.S. 343 (1996)	10
Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992)	1, 3, 13
Massachusetts v. EPA, 549 U.S. 497 (2007)	1
Monsanto Co. v. Geertson Seed Farms, 130 S. Ct. 2743 (2010)	4
Munoz v. PHH Corp., 2011 WL 4048708 (E.D. Cal. Sept. 9, 2011)	8
Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154 (3d Cir. 2001)	11

TABLE OF AUTHORITIES—Continued

	Page
Parker v. Time Warner Entm't Co., 331 F.3d 13 (2d Cir. 2003)	11
Raines v. Byrd, 521 U.S. 811 (1997)	3
Robins v. Spokeo, Inc., 742 F.3d 409 (9th Cir. 2014)	2, 5, 10
Secretary of Labor v. Fitzsimmons, 805 F.2d 682 (7th Cir.1986)	6
Smith v. Bayer Corp., 131 S. Ct. 2368 (2011)	2
Summers v. Earth Island Institute, 555 U.S. 488 (2009)	1
Tyler v. Michaels Stores, Inc., 840 F. Supp. 2d 438 (D. Mass. 2012)	8
United States v. Richardson, 418 U.S. 166 (1974)	4
Wallace v. ConAgra Foods, Inc., ___ F.3d ___, 2014 WL 1356860 (8th Cir. Apr. 4, 2014)	6
Warth v. Seldin, 422 U.S. 490 (1975)	3

Rules

Sup. Ct. R. 37	1
Sup. Ct. R. 37.2(a)	1
Sup. Ct. R. 37.6	1

TABLE OF AUTHORITIES—Continued

Page

Statutes

15 U.S.C. §§ 1681(c)(g) 12

15 U.S.C. §§ 1681n-o 9

15 U.S.C. §§ 1681q-r 9

15 U.S.C. § 1681s 9

29 U.S.C. §§ 1001, *et seq.* 6

Miscellaneous

Epstein, Richard A., *Class Actions: Aggregation, Amplification, and Distortion*, 2003 U. Chi. Legal F. 475 10

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Nagareda, Richard A., *Aggregation and Its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and CAFA*, 106 Colum. L. Rev. 1872 (2006) 11

Pub. L. No. 111-203 § 1088, 124 Stat. 1376 (July 21, 2010) 9

TABLE OF AUTHORITIES—Continued

Page

Scalia, Antonin, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U. L. Rev. 881 (1983) 13

Scheuerman, Sheila B., *Due Process Forgotten: The Problem of Statutory Damages and Class Actions*, 74 Mo. L. Rev. 103 (2009) 10, 12

Schramm-Strosser, Meredith, *The "Not So" Fair Credit Reporting Act: Federal Preemption, Injunctive Relief, and the Need to Return Remedies for Common Law Defamation to the States*, 14 Duq. Bus. L.J. 165 (2012) 9

INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation respectfully submits this brief amicus curiae in support of Petitioner, Spokeo, Inc.[1] Pacific Legal Foundation (PLF) was founded in 1973 and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF litigates matters affecting the public interest at all levels of state and federal courts and represents the views of thousands of supporters nationwide. PLF advocates for limited government, individual rights, and free enterprise. PLF has litigated numerous cases involving Article III standing, *see, e.g.*, *First American Financial Corp. v. Edwards*, 132 S. Ct. 2536 (2012); *Summers v. Earth Island Institute*, 555 U.S. 488 (2009); *Massachusetts v. EPA*, 549 U.S. 497 (2007); *Bennett v. Spear*, 520 U.S. 154 (1997); *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), as well as cases involving the abuse of class action lawsuits for private gain under the guise of public protections, including *Harris v. Mexican Specialty Foods, Inc.*, 564 F.3d 1301 (11th Cir. 2009), and *Soualian v. Int'l Coffee & Tea*, No. 07-56377 (9th Cir. appeal dismissed Sept. 16, 2008).

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the Amicus Curiae's intention to file this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

INTRODUCTION AND SUMMARY OF REASONS FOR GRANTING THE PETITION

Whether Article III limits Congress's authority to create new statutory rights enforceable through private rights of action is a question of recurring importance for federal jurisdiction over lawsuits invoking many consumer protection laws and other regulatory schemes. The question of whether Congress can create injury-free Article III standing via statute, where it otherwise does not exist, has resulted in deep circuit splits that can be resolved only by this Court. The Ninth Circuit in this case abandoned a strong standing requirement and replaced it with an open-ended theory permitting people who are not harmed and who need not claim to be harmed to sue in the name of those who may (or may not) be able to allege such harm. *Robins v. Spokeo, Inc.*, 742 F.3d 409, 413-14 (9th Cir. 2014).

The standing issue presented in this case gains extra importance because the named plaintiff seeks to represent a class. The class action overlay adds complex procedural and policy concerns that impact not only the named parties, but all nonparties similarly situated who would be bound by the case resolution. *Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2380 (2011). The requirement that a litigant fulfill the injury, causation, and redressability elements of standing recognizes that courts are not super-legislatures deciding broad questions of policy but rather tribunals best equipped to resolve individual disputes and clearly defined questions of law and fact.

This Court should grant the petition for writ of certiorari to resolve the recurring and important

question of whether a mere allegation of a statutory violation suffices for Article III standing.

REASONS FOR GRANTING THE PETITION FOR A WRIT OF CERTIORARI

I

THE QUESTION PRESENTED IS ONE OF RECURRING IMPORTANCE NATIONWIDE

This Court will grant certiorari to resolve important and recurring questions of federal law. *Glus v. Brooklyn Eastern Dist. Terminal*, 359 U.S. 231, 232 (1959); *Hamilton v. Texas*, 498 U.S. 908, 909 (1990). This case certainly qualifies. Federal courts simply have been unable to anticipate how this Court will resolve the tension between Article III standing doctrine and Congress's power to define statutory conduct, the violation of which carries civil penalties. In *Arizona Christian School Tuition Organization v. Winn*, 131 S. Ct. 1436, 1442 (2011), this Court held that Article III standing rests on an injury-in-fact, defined as "an invasion of a legally protected interest," that is both "(a) concrete and particularized, and (b) 'actual or imminent, not "conjectural" or "hypothetical."'") (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. at 560). *See also Raines v. Byrd*, 521 U.S. 811, 820 n.3 (1997) ("Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing."). On the other hand, *Warth v. Seldin*, 422 U.S. 490, 500 (1975), holds that "[t]he actual or threatened injury required by Art. III may

exist solely by virtue of statutes creating legal rights, the invasion of which creates standing."

The injury in fact requirement ensures that plaintiffs in federal court are asserting their own individual rights as opposed to the kinds of generalized public rights that should be pressed in the political branches. *Allen v. Wright*, 468 U.S. 737, 750-52 (1982); *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743, 2752 (2010) (Article III requires "an injury [to] be concrete, particularized, and actual or imminent."). *See also* Jonathan S. Massey, *The Two That Got Away: First American Financial Corp. v. Edwards and Kiobel v. Royal Dutch Petroleum Co.*, 7 Charleston L. Rev. 63, 80 (2012) ("Congress does not have a blank check when it comes to Article III."). Plaintiffs may not simply speculate that an injury might occur; the injury in fact must be "fairly traceable to" the alleged source. *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1148 (2013). "For the federal courts to decide questions of law arising outside of cases and controversies would be inimical to the Constitution's democratic character. And the resulting conflict between the judicial and the political branches would not, 'in the long run, be beneficial to either.'" *Winn*, 131 S. Ct. at 1442 (quoting *United States v. Richardson*, 418 U.S. 166, 188-89 (1974) (Powell, J., concurring)).

As the Petition thoroughly documents, circuit courts are split on whether a statutory violation alone encompasses the injury, causation, and redressability requirements of Article III standing. Pet. at 9-11. In those circuits that permit federal court actions based solely on a statutory violation, some courts not only permit non-injured plaintiffs to pursue claims based on the technical violations of a statute, but go so far as to

assume constitutional standing for plaintiffs who *benefit* from the violation. *See, e.g.*, *Kedziora v. Citicorp Nat. Svcs., Inc.*, 901 F. Supp. 1321, 1326 (N.D. Ill 1995), *aff'd in part, rev'd in part on other grounds sub. nom Channell v. Citicorp Nat. Svcs. Inc.*, 89 F.3d 379 (7th Cir. 1996) ("[T]he fact that an undisclosed rebate policy actually enured to the benefit of a consumer is inconsequential. '[T]he broad remedial purposes of TILA . empower[ ] anybody who signs a lease to recover upon proof of nondisclosure in violation of the statute, whether or not the particular nondisclosure produced a demonstrable injury.'") (citation omitted). This expansion of Article III standing to permit plaintiffs who benefit from statutory violations to seek damages in federal court has particular resonance in this case, where the plaintiff argues that his credit report contained information that made him appear more educated, financially successful, and stable than his actual circumstances warranted. Petition at 4-5 (citing *Robins*, 742 F.3d at 411, and the complaint).

The Ninth Circuit's willingness to accept Robins' speculative theory that erroneously favorable information about his life harmed his employment prospects contrasts with the Fourth and Eighth Circuits' rejection of speculated injury as a basis for Article III standing. In *David v. Alphin*, 704 F.3d 327 (4th Cir. 2013), the plaintiff participants in a defined benefits pension plan brought a class action against plan administrators and others, alleging violations of the Employment Retirement Income Security Act (ERISA). The statute certainly authorized the lawsuit, *id.* at 333, but the court questioned whether the plaintiffs had constitutional standing under Article III. The plaintiffs could point to no loss of benefits under

the plan, which was overfunded; they asserted instead that the plan's future investments were at greater risk of underfunding. *Id.* at 336. The Fourth Circuit held "these risk-based theories of standing unpersuasive, not least because they rest on a highly speculative foundation lacking any discernible limiting principle." *Id.* at 338. Therefore, the court found the potential future risk to be "insufficiently 'concrete and particularized' to constitute an injury-in-fact for Article III standing purposes." *Id.* The court noted that the employer would be required to make additional contributions if the plan became underfunded, and that if the employer was insolvent and unable to make those contributions, the federal government guaranteed the benefits. "Thus, the risk that Appellants' pension benefits will at some point in the future be adversely affected as a result of the present alleged ERISA violations is too speculative to give rise to Article III standing." *Id.* The inability to bring a lawsuit in federal courts did not leave the plaintiffs without any remedy should their fears come to pass, because "in situations where plan participants lack standing, the Secretary always remains empowered under the statute to investigate the continuing viability of ERISA plans and to bring suit to enforce ERISA." *Id.* at 339 (citing 29 U.S.C. §§ 1001, *et seq.*; *Secretary of Labor v. Fitzsimmons*, 805 F.2d 682, 689-94 (7th Cir. 1986) (en banc).).

The Eighth Circuit decision in *Wallace v. ConAgra Foods, Inc.*, ___ F.3d ___ , 2014 WL 1356860 (8th Cir. Apr. 4, 2014), also conflicts with the decision below because it firmly rejects the use of speculation to generate the injury-in-fact needed for Article III standing. In *Wallace*, consumers alleged that some unidentified fraction of beef used to make Hebrew

National hot dogs was not kosher, although the packaging identified the hot dogs as made from kosher beef, in violation of state consumer protection laws. *Id.* at *1, n.1. They could not identify any particular package containing non-kosher meat or the percentage of allegedly tainted packages, however, nor could they allege that they had consumed non-kosher meat. *Id.* at *3-4. The court concluded:

> As we cannot discern from the complaint how many packages were tainted with non-kosher beef, it is unclear whether even a bare majority of Hebrew National packages were not kosher. Which means, it is pure speculation to say the particular packages sold to the consumers were tainted by non-kosher beef, while it is quite plausible ConAgra sold the consumers *exactly what was promised*: a higher quality, kosher meat product. Time and again the Supreme Court has reminded lower courts that speculation and conjecture are not injuries cognizable under Article III. *See, e.g., Clapper*, 568 U.S. at___, 133 S. Ct. at 1148.

Id. at *4. These courts' analyses, rejecting speculative harm as a constitutionally required injury, cannot be reconciled with the Ninth Circuit's uncritical acceptance of Robins' theory of future harm that simply equates, *ipse dixit*, statutory standing with constitutional standing.

Courts are anxious for an answer to the questions presented in this case. When *First Am. Corp. v. Edwards* was pending, district courts across the country stayed proceedings to await the answer. *See,*

e.g., *Colby v. Publix Super Markets, Inc.*, 2012 WL 2357745 (N.D. Ala. June 15, 2012) (noting circuit split as to whether statutory violations without actual harm may confer Article III standing and staying proceedings pending outcome in *Edwards*); *Munoz v. PHH Corp.*, 2011 WL 4048708 *4 (E.D. Cal. Sept. 9, 2011) ("[T]he Supreme Court's resolution of *Edwards* will provide direct authority on the standing issue; that is, whether allegations of unlawful kickbacks/fee splitting under RESPA, in the absence of an actual, distinct injury, are sufficient to confer Article III standing."); *Charvat v. First Nat. Bank of Wahoo*, 2012 WL 2016184 *5 (D. Neb. June 4, 2012) ("[T]he pending decision of the Supreme Court in *First American* may alter this Court's understanding of the constitutional minimum requirement of standing. Therefore, it is in the best interest of Charvat that all further proceedings in this matter to be stayed pending the Supreme Court's decision."); *Tyler v. Michaels Stores, Inc.*, 840 F. Supp. 2d 438, 449 n.8 (D. Mass. 2012) ("[C]urrent Supreme Court jurisprudence is not entirely clear as to whether a defendant's violation of a statute that confers a private right of action in and of itself constitutes an "injury in fact" to those protected under the statute. [but] [c]larity on this issue is likely forthcoming [because certiorari was granted in *First American*.]"). The splits among the circuits have only deepened since this Court dismissed *First American*. The Court should delay no longer in resolving these questions.

II

WHETHER ARTICLE III STANDING REQUIREMENTS APPLY TO NON-INJURY CLASS ACTIONS DETERMINES THE EXTENT TO WHICH FEDERAL COURTS ARE MADE COMPLICIT IN CLASS ACTION ABUSES

The Fair Credit Reporting Act (FCRA) created a triple enforcement scheme by combining criminal, civil, and administrative remedies. *See* 15 U.S.C. §§ 1681q-r (criminal penalties); 15 U.S.C. §§ 1681n-o (civil penalties); 15 U.S.C. § 1681s and Pub. L. No. 111-203 § 1088, 124 Stat. 1376 (July 21, 2010) (Federal Trade Commission and Bureau of Consumer Financial Protection have enforcement power over all portions of the FCRA). Meredith Schramm-Strosser, *The "Not So" Fair Credit Reporting Act: Federal Preemption, Injunctive Relief, and the Need to Return Remedies for Common Law Defamation to the States*, 14 Duq. Bus. L.J. 165, 182 (2012); *In re Trans Union Corp. Privacy Litig.*, 211 F.R.D. 328, 351 (N.D. Ill. 2002) ("[A]ny 'uninformed victims' who have suffered no actual economic damage, have been and continue to be protected by the FTC's enforcement of the [FCRA] and regulations."), *appeal dismissed sub nom, Albert v. Trans Union Corp.*, 346 F.3d 734 (7th Cir. 2003).

A consumer actually injured by violations of the statute obviously would be entitled to file a lawsuit seeking damages under the civil penalty provisions of the law. A consumer who identified a statutory violation but who was not injured may request administrative or criminal enforcement. In this case, however, a non-injured consumer not only seeks civil damages, but does so purporting to represent a large

class of consumers. Whether any of these class members, or even the named class member, has been injured in any way by the statutory violation, is irrelevant to the Ninth Circuit. *Robins*, 742 F.3d at 413-14. This approach is flatly contrary to the general rule that Article III standing requirements apply equally to class actions. *Lewis v. Casey*, 518 U.S. 343, 357 (1996); *Grant ex rel. Family Eldercare v. Gilbert*, 324 F.3d 383, 390 (5th Cir. 2003). The class representative must allege an individual, personal injury in order to seek relief on behalf of himself or any other member of the class. *Id.* Article III standing is a necessary bulwork against demonstrated abuses of class litigation, particularly in the context of aggregated statutory claims.

Class action lawsuits unfortunately provide a unique opportunity for avaricious plaintiffs and, more particularly, plaintiffs' lawyers, to exploit the judicial system. *See* Sheila B. Scheuerman, *Due Process Forgotten: The Problem of Statutory Damages and Class Actions*, 74 Mo. L. Rev. 103, 111 (2009) ("Separately, statutory damages and class actions aim to respond to the risk that certain wrongs, namely those resulting in paltry financial losses, will go unaddressed. Combining the litigation incentives of statutory damages and the class action in one suit, however, creates the potential for absurd liability and over-deterrence."). This is particularly true of cases where the aggregation of *de minimis* infractions combined with statutory damages creates the leverage to force the defendant into a payoff settlement. Richard A. Epstein, *Class Actions: Aggregation, Amplification, and Distortion*, 2003 U. Chi. Legal F. 475, 505 (combining the class action with the Sherman Act's treble damages provision creates a "form of

double counting"); Richard A. Nagareda, *Aggregation and Its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and CAFA*, 106 Colum. L. Rev. 1872, 1878 (2006) ("Aggregation of statutory damages in this setting would make for a kind of double counting discordant with the underlying remedial scheme."); *see also id.* at 1887 ("[C]lass certification layered on top of per-violation damages in the Cable Act would distort, rather than facilitate, the remedial scheme of the statute."); *Parker v. Time Warner Entm't Co.*, 331 F.3d 13, 22 (2d Cir. 2003) (When statutory damages claims are aggregated into a class action, the potentially enormous amount of damages at stake "potentially distorts the purpose of both statutory damages and class actions.").

In such cases, plaintiffs' attorneys know that class certification will effectively function as a finding of liability. *See AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752 (2011) ("Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims."); *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978) ("Certification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense."); *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 165 (3d Cir. 2001) ("[A]n adverse certification decision will likely have a dispositive impact on the course and outcome of the litigation."); *Castano v. American Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) ("In addition to skewing trial outcomes, class certification creates insurmountable pressure on defendants to settle."). This results in a "troubling

dynamic of allowing certain actors in the system to spin even good-faith, technical violations of federal law into lucrative litigation, if not for themselves then for the attorneys who conceive of the suit." *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA, et al.*, 559 U.S. 573, 617 (2010) (Kennedy, J., dissenting).

Class action abuse weakens the rule of law and drives up the costs of living for consumers. The justice system was created to allow injured parties an opportunity for redress, not to allow profiteers to seize on insubstantial legal pretexts as a chance to enrich themselves at others' expense. "Any device which is workable only because it utilizes the threat of unmanageable and expensive litigation to compel settlement is not a rule of procedure—it is a form of legalized blackmail." Milton Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits—The Twenty-Third Annual Antitrust Review*, 71 Colum. L. Rev. 1, 9 (1971). Professor Sheila B. Scheuerman examined the growth industry in these lawsuits. Scheuerman, *supra*, at 113. She notes that plaintiffs' attorneys alleging "statutory damages class actions under the [Fair and Accurate Credit Transactions Act (FACTA), 15 U.S.C. § 1681(c)(g) (part of the FCRA)], have become so numerous that the Judicial Panel on Multidistrict Litigation has faced several requests to consolidate pre-trial proceedings." *Id.* (citations omitted). FACTA was just the beginning. "Plaintiffs' attorneys have combined numerous other state and federal statutory damages regimes with the class action device, including the Telephone Consumer Protection Act, the Cable Communications Policy Act, the Fair Credit Reporting Act, and state consumer fraud statutes." *Id.* at 113-14 (citations omitted). Given the number of federal statutes that, according to

some courts, create congressional standing simply by virtue of their enactment, the liability implications cut wide swaths through every part of the American economy.

Article III standing requirements ensure that federal courts do not provide a vehicle for these types of abusive, non-injury class action lawsuits. *See Lujan*, 504 U.S. at 559-77 (Article III standing doctrine includes a concrete injury requirement to prevent citizen bystanders from suing about an alleged statutory violation that does not affect them personally and could be addressed by the political branches instead.). The Constitution was designed to protect the people from governmental overreach by curtailing the orbit of all three branches. *American Federation of Labor v. American Sash and Door Co.*, 335 U.S. 538, 545 (1949) ("[T]he Government–the organ of the whole people–is restricted by the system of checks and balances established by our Constitution."). Federal courts must act within the constraints of Article III, resolving only the true cases and controversies presented to them. *See* Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U. L. Rev. 881, 881 (1983) (The "judicial doctrine of standing is a crucial and inseparable element" of separation of powers principles required by the structure and original intent of the Constitution, "which successively describes where the legislative, executive and judicial powers, respectively, shall reside."). The decision of the court below, and several other circuits, significantly weakens these constitutional constraints.

CONCLUSION

The petition for a writ of certiorari should be granted.

DATED: June, 2014.

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Pacific Legal Foundation

AMICUS CURIAE BRIEF

Supreme Court, U.S.
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No. 13-1339

IN THE

Supreme Court of the United States

SPOKEO, INC.,

Petitioner,

v.

THOMAS ROBINS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF TRANS UNION LLC AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICUS CURIAE*	1
SUMMARY OF THE ARGUMENT	2
ARGUMENT	6
A. This Court Should Restrain Abuses of the Class Action System	6
B. Article III's Standing Requirements Impose an Important Restraint on the Class Device, and Help Ensure Good Governance and Sound Policy Choices	8
C. Allowing Standing for Injury in Law, Without Corresponding Injury in Fact, Violates Core Separation of Powers Principles	12
D. Allowing Standing for Injury in Law, Without Corresponding Injury in Fact, in a Lawsuit Challenging Communications, Also Threatens Important First Amendment Values	15
E. Article III Requires the FCRA to Be Construed to Include an Injury-in-Fact Requirement	17
CONCLUSION	21

TABLE OF AUTHORITIES

CASES Page(s)

Allen v. Wright,
468 U.S. 737 (1984) 13

Arizona Christian Sch. Tuition Org. v. Winn,
563 U.S. __, 131 S. Ct. 1436 (2011)..... 8

AT&T Mobility LLC v. Concepcion,
563 U.S. __, 131 S. Ct. 1740 (2011)..... 7

Bartnicki v. Vopper,
532 U.S. 514 (2001) 15

Bell Atlantic v. Twombly,
550 U.S. 544 (2007) 7

Brown v. Entm't Merchants Ass'n,
564 U.S. ___, 131 S. Ct. 2729 (2011)..... 17

Cassara v. DAC Servs. Inc.,
276 F.3d 1210 (10th Cir. 2002) 18

Citizens United v. Fed. Election Comm'n,
558 U.S. 310 (2010) 16

Clapper v. Amnesty Int'l USA,
568 U.S. __, 133 S. Ct. 1138 (2013)..... 9, 12

Coopers & Lybrand v. Livesay,
437 U.S. 463 (1978) 7

Doe v. Chao,
540 U.S. 614 (2004) 18

Doe v. National Bd. of Med. Exam'rs,
199 F.3d 146 (3d Cir. 1999)..... 11

Douglas v. Cunningham,
294 U.S. 207 (1935) 20

Dowell v. Wells Fargo Bank, N.A.,
517 F.3d 1024 (8th Cir. 2008) 18

TABLE OF AUTHORITIES—Continued

Page(s)

Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985) 5

Edwards v. First American Corp., 610 F.3d 514 (9th Cir. 2010), *cert. granted*, 131 S. Ct. 3022 (2011), *cert. dismissed as improvidently granted*, 132 S. Ct. 2536 (2012) 7

Gen. Tel. Co. of Southwest v. Falcon, 457 U.S. 147 (1982) 11

Genesis Healthcare Corp. v. Symczyk, 569 U.S. __, 133 S. Ct. 1523 (2013)..... 12

Hein v. Freedom From Religion Found., 551 U.S. 587 (2007) 14

Hollingworth v. Perry, 570 U.S. __, 133 S. Ct. 2652 (2013)..... 13, 14, 21

Holmes v. Sec. Investor Prot. Corp., 503 U.S. 258 (1992) 20

In re Toys R Us-Delaware, Inc.-Fair & Accurate Credit Transactions Act (FACTA) Litig., 295 F.R.D. 438 (C.D. Cal. 2014)..... 4

Joint Stock Soc'y v. UDV N. Am., Inc., 266 F.3d 164 (3d Cir. 2001)..... 20

Lance v. Coffman, 549 U.S. 437 (2007) 14

London v. Wal-Mart Stores, Inc., 340 F.3d 1246 (11th Cir. 2003) 19

TABLE OF AUTHORITIES—Continued

Page(s)

Lovell v. City of Griffin,
303 U.S. 444 (1938) 16

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992) 10, 13

Marbury v. Madison,
5 U.S. (1 Cranch.) 137 (1803) 12

Murray v. GMAC Mortgage Corp.,
434 F.3d 948 (7th Cir. 2006) 6

New York Times Co. v. Sullivan,
376 U.S. 254 (1964) 16

Nike, Inc. v. Kasky,
539 U.S. 654 (2003) 6-7, 9-10

O'Shea v. Littleton,
414 U.S. 488 (1974) 13

Paroline v. United States,
572 U.S. __, 134 S. Ct. 1710 (2014) 20

Perrone v. General Motors Acceptance Corp.,
232 F.3d 433 (5th Cir. 2000) 20

Raines v. Byrd,
521 U.S. 811 (1997) 12

Redman v. RadioShack Corp.,
No. 11 C 6741, 2014 WL 497438 (N.D. Ill. Feb. 7, 2014) 4

Rust v. Sullivan,
500 U.S. 173 (1991) 20

Safeco Ins. Co. v. Burr,
551 U.S. 47 (2007) 5

TABLE OF AUTHORITIES—Continued

Page(s)

Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393 (2010) 6

Simon v. E. Kentucky Welfare Rights Org., 426 U.S. 26 (1976) 10-11, 14

Sorrell v. IMS Health, Inc., 564 U.S. __, 131 S. Ct. 2653 (2011) 5, 15

Steel Co. v. Citizens for a Better Env't, 523 U.S. 83 (1998) 14

Stillmock v. Weis Markets, Inc., 385 F. App'x 267 (4th Cir. 2010) 19

Summers v. Earth Island Inst., 555 U.S. 488 (2009) 10, 20

Trans Union LLC v. Fed. Trade Comm'n, 536 U.S. 915 (2002) 6

TRW, Inc. v. Andrews, 534 U.S. 19 (2001) 18

United States v. Spokeo, Inc., No. CV12-5001-MMM(SHx) (C.D. Cal. June 7, 2012) 9

United States v. Alvarez, 567 U.S. __, 132 S. Ct. 2537 (2012) 15, 17

United States v. Weiss, 467 F.3d 1300 (11th Cir. 2006) 11

United States ex rel. Kreindler & Kreindler v. United Techs Corp., 985 F.2d 1148 (2d Cir. 1993) 11

TABLE OF AUTHORITIES—Continued

Page(s)

United States v. X-Citement Video, Inc., 513 U.S. 64 (1994) 17

Wal-Mart Stores, Inc. v. Dukes, 564 U.S. __, 131 S. Ct. 2541 (2011) 11

Wallace v. ConAgra Foods, Inc., 747 F.3d 1025 (8th Cir. 2014) 10, 11

Warth v. Seldin, 422 U.S. 490 (1975) 10, 13

CONSTITUTION

U.S. Const. amend. I ..... *passim*

U.S. Const. art. II 13

U.S. Const. art. II, § 3 10

U.S. Const. art. III ..... *passim*

STATUTES AND REGULATIONS

12 C.F.R. §§ 1090.100-1090.106 8

28 U.S.C. § 2072(b) 11

Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. § 5301 1, 8

12 U.S.C. § 5514 8

Fair and Accurate Credit Transactions Act of 2003, 15 U.S.C. § 1681c(g) 4

TABLE OF AUTHORITIES—Continued

Page(s)

Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq*.....*passim*

§ 603(p), 15 U.S.C. § 1681a(p)..... 1

§ 616, 15 U.S.C. § 1681n 17

§ 616(a)(1), 15 U.S.C. § 1681n(a)(1)..... 19

§ 616(a)(1)(A), 15 U.S.C. § 1681n(a)(1)(A).....18, 21

§ 618, 15 U.S.C. § 1681p 18

§ 621, 15 U.S.C. § 1681s..... 8, 9

Pub. L. 108-159, § 156, 117 Stat. 1968 (Dec. 4, 2003)..... 18

RULES

Fed. R. Civ. P. 23..... 9, 19

OTHER AUTHORITIES

STEPHEN BREYER, BREAKING THE VICIOUS CYCLE: TOWARD EFFECTIVE RISK REGULATION (Harvard University Press 1993)..... 9

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TABLE OF AUTHORITIES—Continued

Page(s)

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Max Mosley, *Google and the EU on Being Forgotten*, ECONOMIST, May 17, 2014, *available at* http://www.economist.com/news/leaders/21602219-right-be-forgotten-sounds-attractive-it-creates-more-problems-it-solves-being 16-17

John G. Roberts, *Article III Limits on Statutory Standing*, 42 Duke L.J. 1219 (1993) 13

S. Rep. No. 91-517 (1969) 19-20

Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U. L. Rev. 881 (1983) 14

INTEREST OF *AMICUS CURIAE*

Trans Union LLC ("TransUnion") is a "consumer reporting agency that compiles and maintains files on consumers on a nationwide basis," as defined in Section 603(p) of the Fair Credit Reporting Act (the "FCRA" or the "Act"), 15 U.S.C. § 1681a(p). As one of the nation's three major credit bureaus, TransUnion maintains billions of pieces of information about United States consumers, and issues millions of consumer reports every month. Given these functions and the consumer credit reporting system's critical importance to the national economy, TransUnion is regulated comprehensively as a "consumer reporting agency" by the FCRA, as well as by certain state mini-FCRAs and the Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. § 5301 (the "Dodd-Frank Act").[1]

TransUnion has a strong interest in ensuring that the Act is applied in accordance with Constitutional requirements and is properly construed. It expends millions of dollars annually to ensure compliance with credit reporting laws, regulations and relevant judicial decisions. The opinion below threatens to greatly expand FCRA liability beyond its intended scope of consumer protection, thereby exposing TransUnion, other credit bureaus, data furnishers and users of credit reports to potentially massive class action cases brought by persons without any real-world harm.

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[1] Pursuant to Rule 37.2(a), letters of consent of all parties are being filed with the Clerk of the Court. Counsel of record for all parties received timely notice of *amicus curiae's* intent to file this brief. Pursuant to Rule 37.6, *amicus curiae* certifies that no counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus curiae* and its counsel made a monetary contribution to the preparation or submission of this brief.

If this Court does not grant the petition for certiorari and correct the Ninth Circuit's error, then the immediate result will be more "bet the company" litigation filed under the Act. The consequent defense costs and inevitable corporate skittishness with respect to offering new data services will reduce the scope of predictive information available to credit grantors to manage risk. Moreover, it will increase the expense of delivering such new information services that survive legal challenge. Ultimately, consumers will bear the brunt of these effects in the form of diminished access to credit, delays in obtaining credit and/or higher costs of obtaining it.

SUMMARY OF THE ARGUMENT

This Court should confirm that alleged FCRA violations not causing actual injury do not merit financial awards. Even if the Court should believe otherwise, it should nevertheless provide definitive guidance to enable those subject to the FCRA to fully understand what peril results from any compliance error under the Act, so that they can appropriately pass the costs associated with the risk of this extreme potential liability to those who ultimately benefit from the services regulated under the Act: all United States consumers who currently reap the rewards of the miracle of instant credit in the modern American economy.

Accordingly, this Court should grant certiorari to consider whether injury in law, without corresponding injury in fact, satisfies Article III of the Constitution's limitation of the judicial power to cases and controversies. In other words, may Congress constitutionally expand the power of the federal courts to hear disputes where the plaintiff has not been

deprived of a property or contract interest, and has not suffered any traditional tort-like injury?

In various circumstances, the Justices of this Court and other members of the federal judiciary have expressed concern about the rising tide of massive class action cases, and the harm they may pose to the economic system and principles of sound policymaking. To keep the class action in its appropriate procedural place, this Court should recognize an inherent constitutional limitation under Article III. A class action violates the Constitution unless the proposed class representative and each member of the proposed class sustained an injury in fact.

The problem posed is a particularly pressing one with respect to FCRA actions, as these actions challenge informational activity subject to First Amendment protection. In addition to regulating consumer reporting agencies, the Act imposes requirements on those who furnish data into the consumer reporting system. It also imposes requirements on those who obtain consumer reports, reaching not only lenders and insurers, but also the vast majority of employers (including governmental agencies) and landlords of all sizes.

The FCRA was enacted before the procedural vehicle of the consumer class action became routinely employed, and before the information revolution that has transformed the world. The FCRA's absence of an express cap on class awards has led many plaintiffs' attorneys to treat FCRA litigation like a trip to a casino; to throw the dice in hopes of certifying a potentially enormous statutory damages class, recognizing that once a class is certified, the defendant

will have no choice but to settle the case rather than risk bankruptcy.[2]

There has recently been a vast expansion of enabling information technology that has created immediate access to public and private data sources. This has necessitated that business dealings be structured with numerous parties spread throughout the United States. Yet many businesses and individuals are unaware of their potential FCRA risk until they are sued for annihilating damages, often based on the activity of another person who may have failed to honor his contractual obligations or simply was careless with his collection, handling, processing or management of data. Many new information-based businesses or potential supporters of this industry were beyond the imagination of the FCRA's drafters when the statute was enacted. These businesses now face potentially catastrophic consequences that are for all practical purposes uninsurable because of

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[2] The most egregious examples occur under the 2003 Fair and Accurate Credit Transactions Act ("FACTA") amendments to the FCRA, requiring redaction of information on credit card receipts. *See* 15 U.S.C. § 1681c(g). It is widely accepted that the risk of actual damages from this kind of FACTA violation is exceptionally small; indeed, probably no consumer ever has been actually harmed. Nonetheless, the immense statutory damages risk has led to obscenely large settlements. *E.g., In re Toys R Us-Delaware, Inc.-Fair & Accurate Credit Transactions Act (FACTA) Litig.*, 295 F.R.D. 438 (C.D. Cal. 2014) (approving class settlement that could potentially award the class $391.5 million and granting class counsel $458,602.54 in attorneys' fees even though "no putative class member had alleged any actual injury"); *Redman v. RadioShack Corp.*, No. 11 C 6741, 2014 WL 497438 (N.D. Ill. Feb. 7, 2014) (approving class settlement that could potentially award the class $40 million, and granting class counsel approximately $1 million in attorneys' fees, even though class members suffered no actual damages).

the size of the potential risk. Class action attorneys recognize what leverage they have under the current regime, and press it to the utmost. Although they may cloak themselves with sanctimonious platitudes about needing to protect consumers, their true goal is to bully the defendant into paying a large fee as part of a settlement that delivers minimal relief to the public.

Few defendants faced with a claim that seeks statutory damages under a law for which there is a "dearth of guidance and [] less-than-pellucid statutory text," *Safeco Ins. Co. v. Burr*, 551 U.S. 47, 70 (2007), will roll the dice in litigation when the result of losing the case is the total loss of their business. The issue inherent in all class actions—that class certification itself often places defendants in a must-settle position—is more pernicious under the FCRA, due to the Act's regulation of commercial speech. *See Sorrell v. IMS Health, Inc.*, 564 U.S. __, 131 S. Ct. 2653, 2667 (2011) (credit report is "speech") (citing *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 759 (1985)). There are grave First Amendment implications when the procedural device of the class action threatens, as a practical matter, to restrict innovation and limit the free flow of information critical to economic decision-making.

The FCRA, properly construed, allows only consumers with true injury in fact to receive statutory damages. Technical violations that do not actually harm the vast majority of consumers should not threaten the destruction, through private litigation, of vital components of America's economic and informational systems.

ARGUMENT

A. This Court Should Restrain Abuses of the Class Action System.

Members of this Court often have expressed concerns that representative litigation, pursued without restraint, threatens the American economy and polity.

In *Trans Union LLC v. Fed. Trade Comm'n*, 536 U.S. 915 (2002) (Kennedy, J., dissenting), Justice Kennedy wrote, dissenting from the denial of certiorari, that a potential billion dollar exposure resulting from a FCRA statutory damages class action risked adverse effects on the nation's economy and presented important First Amendment concerns.[3] Similarly, in her dissent in *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 445 n.3 (2010) (Ginsburg, J., dissenting), Justice Ginsburg recognized, "When representative plaintiffs seek statutory damages, pressure to settle may be heightened because a class action poses the risk of massive liability unmoored to actual injury." *Id.* (citation omitted). And Justice Breyer, dissenting from the dismissal of certiorari in *Nike, Inc. v. Kasky*,

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[3] TransUnion actively litigated the class actions filed in the wake of the FTC order at issue in this ruling, and incurred tens of millions of dollars in defense costs. Later, the Seventh Circuit ruled, in an unrelated case, that the possibility of an unfair annihilating statutory damages award could not be considered at the class certification stage. *See Murray v. GMAC Mortgage Corp.*, 434 F.3d 948 (7th Cir. 2006). Faced with this precedent (TransUnion's headquarters are in Chicago), TransUnion had no practical choice but to settle the class cases for $75 million: TransUnion could not litigate in the face of an existential threat, even though it did not believe it ultimately would be found liable for willfully violating the Act.

539 U.S. 654, 678-80 (2003) (Breyer, J., dissenting), warned that when private plaintiffs may bring suit "even though they themselves have suffered no harm," they may "potentially constitute a large and hostile crowd freely able to bring prosecutions designed to vindicate their beliefs, and to do so unencumbered by the legal and practical checks" on "public enforcement agencies." *Id.* (citation omitted).

This Court as a whole, of course, has repeatedly recognized the dangers posed by class cases. *E.g.*, *AT&T Mobility LLC v. Concepcion*, 563 U.S. __, 131 S. Ct. 1740, 1752 (2011) ("Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims."); *Bell Atlantic v. Twombly*, 550 U.S. 544, 559 (2007) (stating that "the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching [discovery] proceedings"); *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978) ("Certification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense.").

In *Edwards v. First American Corp.*, 610 F.3d 514 (9th Cir. 2010), *cert. granted*, 131 S. Ct. 3022 (2011), *cert. dismissed as improvidently granted*, 132 S. Ct. 2536 (2012), this Court did not address whether a plaintiff lacking injury in fact could pursue a class case. The present petition presents a better vehicle for this Court to decide this important and recurring question. Unlike in *Edwards*, respondent here paid no money to petitioner and suffered no pecuniary impact whatsoever from the practices challenged in the litigation. The Ninth Circuit's decision below is based on a bare allegation that petitioner is subject to

the FCRA, but failed to comply with it. (Pet. App. at 7a-9a.) Thus the Ninth Circuit would allow a class claim to proceed even if the alleged violation had no impact whatsoever on the claimant's or any other putative class member's ability to obtain employment, insurance or credit. Under the Ninth Circuit's expansive view, the class procedure upsets the substantive balance Congress recognized in the FCRA itself: to protect consumers' interests while at the same time imposing only reasonable duties on consumer reporting agencies and others regulated under the Act.

The present petition should be granted because a proper approach to standing is an essential check against abuses of the procedural class device. "In an era of frequent litigation, class actions, sweeping injunctions with prospective effect, and continuing jurisdiction to enforce judicial remedies, courts must be more careful to insist on the formal rules of standing, not less so." *Arizona Christian Sch. Tuition Org. v. Winn*, 563 U.S. __, 131 S. Ct. 1436, 1449 (2011).

B. Article III's Standing Requirements Impose an Important Restraint on the Class Device, and Help Ensure Good Governance and Sound Policy Choices.

There may be areas of the law requiring private attorneys general to assist with enforcement efforts. Consumer reporting is not one of them. The FCRA itself authorizes administrative enforcement by both federal and state agencies. *See* 15 U.S.C. § 1681s. Moreover, independent of the FCRA, the Consumer Financial Protection Bureau has, under the Dodd-Frank Act, extensive supervisory and enforcement authority over the consumer reporting industry. *See* 12 U.S.C. § 5514; 12 C.F.R. §§ 1090.100-1090.106. The Federal Trade Commission also has FCRA

enforcement powers, and in 2012 obtained a consent decree against petitioner, imposing a substantial (but not annihilating) fine and mandating changes to its business practices. *See United States v. Spokeo, Inc.*, No. CV12-5001-MMM(SHx) (C.D. Cal. June 7, 2012).

In the present litigation (like in so many others) a private attorney is simply seeking to collect a bounty, not to improve the consumer reporting system. As a practical matter, no-injury statutory damages cases impose overshadowing regulation independent of any "rational, overall agenda" for achieving an appropriate balance between innovation and consumer protection. *See* STEPHEN BREYER, BREAKING THE VICIOUS CYCLE: TOWARD EFFECTIVE RISK REGULATION 20 (Harvard University Press 1993). Recognizing an Article III limit on such litigation is therefore essential to "prevent the judicial process from being used to usurp the powers of the political branches," which include assessing new technologies and their social implications, and (when necessary) taking appropriate, measured enforcement actions on behalf of the general public. *See Clapper v. Amnesty Int'l USA*, 568 U.S. __, 133 S. Ct. 1138, 1146 (2013).

When an uninjured plaintiff is empowered through Federal Rule of Civil Procedure 23 to seek catastrophic statutory damages for an uninjured class pursuant to the FCRA, the governmental power to prohibit or mandate particular conduct is effectively delegated to private class action attorneys, in spite of the statutory text's assignment of injunctive relief claims to government officials alone. *See* 15 U.S.C. § 1681s. Worse, private class action attorneys, unlike regulators, are highly incentivized to conclude matters quickly for their personal financial benefit, rather than to provide the greatest public benefits. *See Nike*, 539

U.S. at 679-80 (warning of the lack of any political check on lawsuits filed by uninjured plaintiffs) (Breyer, J., dissenting from the dismissal of certiorari); Tara L. Grove, *Standing as an Article II Nondelegation Doctrine*, 11 U. Pa. J. Const. L. 781, 818 (2009) ("Virtually none of the checks on executive enforcement discretion apply to private parties. Private enforcement decisions are not subject to judicial review for the simple reason that there are no constitutional or other legal restrictions to enforce. Nor are there political constraints.") (footnote omitted). Companies seeking to avoid these risks of unchecked enforcement proceedings will be reluctant to bring legally untested informational products to the market, thereby slowing innovation and impairing the public interest.

Article III's injury-in-fact requirement "is founded in concern about the proper—and properly limited—role of the courts in a democratic society." *Summers v. Earth Island Inst.*, 555 U.S. 488, 492-93 (2009) (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975)). Congress may not "transfer from the President to the courts the Chief Executive's most important constitutional duty, to 'take Care that the Laws be faithfully executed.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 577 (1992) (quoting U.S. Const. art. II, § 3). Congress, of course, has the power to legislate a private remedy for an actual harm, assuming Congress is otherwise acting within the scope of its Constitutional powers. *See Lujan*, 504 U.S. at 578. But Article III is offended when Congress attempts to grant judicial recourse to those who have not suffered any injury in fact. *Wallace v. ConAgra Foods, Inc.*, 747 F.3d 1025, 1030 (8th Cir. 2014). This principle applies in both individual and class cases. *See Simon v. E. Kentucky Welfare Rights Org.*,

426 U.S. 26, 40 (1976). The procedural device of a class action may not be used to enlarge, abridge or modify any substantive right, and Congress disclaims any intent to do so. *See* 28 U.S.C. § 2072(b); *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. __, 131 S. Ct. 2541, 2561 (2011). Thus, in a class case, the plaintiff must "demonstrate that the class members 'have suffered the same injury,' This does not mean merely that they have all suffered a violation of the same provision of law." *Wal-Mart*, 131 S. Ct. at 2551 (quoting *Gen. Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 157 (1982)). A class action based solely on injury in law, but with no rigorous analysis of whether the proposed class representative or any members of the proposed class suffered injury in fact (and if so, which ones), is anathema to these principles.

The Ninth Circuit's recognition of standing for injury in law, decoupled from any real-world harm, is profoundly inconsistent with authorities from the Second, Third and Eleventh Circuits, in addition to the Eighth Circuit's recent *Wallace* opinion. "The proper analysis of standing focuses on whether the plaintiff suffered an actual injury, not on whether a statute was violated." *Doe v. National Bd. of Med. Exam'rs*, 199 F.3d 146, 153 (3d Cir. 1999); *see also United States v. Weiss*, 467 F.3d 1300, 1310-11 (11th Cir. 2006) ("While it is true that Congress may enact statutes creating legal rights [a] federal court's jurisdiction can be invoked only when the plaintiff himself has suffered some threatened or actual injury resulting from the putatively illegal action[.]" (internal citations and quotation marks omitted) (alteration and second ellipses in original); *United States ex rel. Kreindler & Kreindler v. United Techs Corp.*, 985 F.2d 1148, 1154 (2d Cir. 1993) ("Nevertheless, some injury-in-fact must be shown to satisfy constitutional requirements, for

Congress cannot waive the constitutional minimum of injury-in-fact.").

Treating a technical violation of a statute as an injury in fact "improperly waters down the fundamental requirements of Article III" by ensuring that the plaintiff will have standing whenever a statutory violation is alleged. *See Clapper*, 133 S. Ct. at 1151. Certiorari should be granted because the Ninth Circuit has departed from this Court's precedents, deviated from its sister Circuits and ignored the settled principle "that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff that would not otherwise have standing." *Raines v. Byrd*, 521 U.S. 811, 820 n.3 (1997).

C. Allowing Standing for Injury in Law, Without Corresponding Injury in Fact, Violates Core Separation of Powers Principles.

This Court has long recognized that just as Article III protects the courts from infringements on their Constitutional powers, Article III also prohibits Congress from expanding the judicial power beyond its Constitutional limits. *See Marbury v. Madison*, 5 U.S. (1 Cranch.) 137, 176-77 (1803).

By allowing standing for pure injury in law, with no corresponding injury in fact, the Ninth Circuit has improperly expanded the court system's "constitutionally limited role of adjudicating actual and concrete disputes, the resolutions of which have direct consequences on the parties involved." *See Genesis Healthcare Corp. v. Symczyk*, 569 U.S. __, 133 S. Ct. 1523, 1528 (2013).

Here, allowing an uninjured plaintiff to pursue a class claim for statutory damages violates "the general prohibition on a litigant's raising another person's legal rights" and "the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches." *See Allen v. Wright*, 468 U.S. 737, 751 (1984). The core of respondent's claim here is that petitioner should, as a general matter, be regulated under the FCRA. Unless petitioner's failure to be so regulated causes an injury in fact to respondent, then respondent lacks standing, because he has only a "nonconcrete interest in the proper administration of the laws," and has not been injured in any "concrete and personal way." *See Lujan*, 504 U.S. at 580-81 (Kennedy, J., concurring in part and concurring in the judgment). "Abstract injury is not enough." *O'Shea v. Littleton*, 414 U.S. 488, 495 (1974); *see also Hollingworth v. Perry*, 570 U.S. __, 133 S. Ct. 2652, 2661 (2013) (petitioner's interest in determining the constitutional validity of a generally applicable California law did not confer standing absent personal, tangible harm); *Warth*, 422 U.S. at 499 (stating that "when the asserted harm is a 'generalized grievance' shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant exercise of jurisdiction"). These concepts are deeply embedded in the traditional understanding of the judiciary's proper role in society, and Article III standing doctrines help to ensure that the federal courts give proper deference to the Executive branch's responsibility under Article II to take care that the laws be faithfully executed. *See* John G. Roberts, *Article III Limits on Statutory Standing*, 42 Duke L.J. 1219, 1230 (1993).

Congress exceeds its power by requiring the courts to hear litigation filed by or on behalf of individuals

who neither were injured personally by a particular practice, nor face an imminent threat of such injury. The concept of pure injury in law is simply a "kind of undifferentiated, generalized grievance" that someone else has disobeyed a statute, but the Constitution does not authorize private litigation on this basis. *See Lance v. Coffman*, 549 U.S. 437, 442 (2007); Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U. L. Rev. 881, 886 (1983) (stating that "there is a limit upon even the power of Congress to convert generalized benefits into legal rights—and that is the limitation imposed by the so-called 'core' requirement of standing. It is a limitation, I would assert, only upon the *congressional* power to confer standing, and not upon the courts, since the courts *have* no such power to begin with.") (emphasis in original).

"No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *Simon*, 426 U.S. at 37. "One essential aspect of this requirement is that any person invoking the power of a federal court must demonstrate standing to do so." *Hollingworth*, 133 S. Ct. at 2660. "The constitutional requirements for federal-court jurisdiction—including the standing requirements and Article III—'are an essential ingredient of separation and equilibrium of powers.'" *Hein v. Freedom From Religion Found.*, 551 U.S. 587, 611 (2007) (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101 (1998)).

The Ninth Circuit's opinion improperly departs from the above principles. Article III does not authorize a court to hear a dispute brought by a plaintiff who suffered no injury in fact, and Congress may not

through legislation allow what the Constitution prohibits. Certiorari should be granted so that this Court may explain how these limits should be defined and applied.

D. Allowing Standing for Injury in Law, Without Corresponding Injury in Fact, in a Lawsuit Challenging Communications, Also Threatens Important First Amendment Values.

Much of the FCRA attempts to protect the same interests protected by the common law of defamation or invasion of privacy. The opinion below, however, would vastly expand FCRA liability to circumstances where no plaintiff or any putative class member suffered any actual impairment to his reputation or any other traditional tort-like injury. Here, sound Article III jurisprudence will help protect important First Amendment values. To allow uninjured consumers to participate in FCRA class actions "works speech-related harm that is out of proportion to" the statute's goals. *See United States v. Alvarez*, 567 U.S. __, 132 S. Ct. 2537, 2551 (2012) (Breyer, J., concurring).

This Court recognizes that "the creation and dissemination of information are speech within the meaning of the First Amendment. Facts, after all, are the beginning point for much of the speech that is most essential to advance human knowledge and to conduct human affairs." *Sorrell*, 131 S. Ct. at 2667 (citing *Bartnicki v. Vopper*, 532 U.S. 514, 527 (2001)) (stating that "if the acts of 'disclosing' and 'publishing' information do not constitute speech, it is hard to imagine what does fall within that category, as distinct from the category of expressive conduct") (internal quotation marks and alterations omitted).

Rapid advances in technology will continue to lead to new and different methods of distributing information, unless legal risk interferes. The First Amendment, however, protects the transmission of information even if transmission occurs by means other than traditional print media. *E.g.*, *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938) ("every sort of publication which affords a vehicle of information and opinion"). The First Amendment also protects for-profit ventures. *E.g.*, *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 351-52 (2010). The threat of a class action litigation seeking millions or even billions of dollars in FCRA statutory damages will have an extraordinary chilling effect on companies that otherwise would expand access to publicly available information. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 294-95 (1964) (discussing how civil litigation may impair protected First Amendment activity; "public feelings may make local as well as out-of-state news-papers easy prey for libel verdict seekers") (Black, J., concurring).

The underlying claim in the present litigation comes dangerously close to suggesting that the FCRA provides consumers with a "right to be forgotten" on the internet, something out-of-tune with American free speech principles.[4] No-injury statutory damages

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[4] *See* Ciaran Giles et al., *European Court: Google Must Yield On Personal Info*, WASH. POST, May 13, 2014, ¶ 17, available at http://www.washingtonpost.com/world/europe/european-court-google-must-amend-some-results/2014/05/13/f372fe08-da78-11e3-a837-8835df6c12c4_story.html (quoting Professor Joel Reidenberg regarding the Court of Justice of the European Union's decision: "'There's not much guidance for Google on how to figure out how and when they are supposed to comply with take-down requests. . .'"); Max Mosley, *Google and the EU on Being Forgotten*, ECONOMIST, May 17, 2014, ¶ 4, available at

class actions improperly threaten "a novel restriction on content" in a novel technological environment. *See Alvarez*, 132 S. Ct. at 2547 (plurality opinion) (quoting *Brown v. Entm't Merchants Ass'n*, 564 U.S. ___, 131 S. Ct. 2729, 2734 (2011)).

If Congress has the power to override Article III's standing requirements and allow private litigants to commence statutory damages class actions, without regard to injury in fact, companies will refrain from developing new information products due to the specter of destructive litigation that will follow even technical statutory violations. This Court's Article III jurisprudence supports its First Amendment jurisprudence, and that toe is a reason to grant certiorari.

E. Article III Requires the FCRA to Be Construed to Include an Injury-in-Fact Requirement.

At a minimum, Article III requires the FCRA to be construed to include an injury-in-fact requirement. *See United States v. X-Citement Video, Inc.*, 513 U.S. 64, 69 (1994) (federal statutes should be "construed where fairly possible so as to avoid substantial constitutional questions"). Such a constitutionally-compliant construction will not hinder, but rather will promote Congress's goal of fairly compensating those consumers who are actually harmed by a violation.

An injury-in-fact requirement thus comports with Article III, the statutory text and Congressional intent. Section 1681n nowhere states expressly that a

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http://www.economist.com/news/leaders/21602219-right-be-forgotten-sounds-attractive-it-creates-more-problems-it-solves-being ("Even if Google is made to censor its search results in Europe, in America the First Amendment's free-speech provision usually trumps privacy concerns.").

wholly undamaged consumer has a right to sue. To the contrary, it states that a defendant who violates any requirement of the Act with respect to any consumer "is liable to that consumer in an amount equal to any actual damages sustained by the consumer as a result of the [willful] failure [to comply with a statutory "requirement"] or damages of not less than $100 and not more than $1,000." 15 U.S.C. § 1681n(a)(1)(A). Read properly, this provision means that where damages are genuine but small, or difficult to quantify, the damaged consumer is guaranteed a minimum recovery. Nonetheless, some real-world impact on the plaintiff still must be shown as a precondition to suit. "A reasonable reading of the statute could still require proof of actual damages but simply substitute statutory rather than actual damages for the purpose of calculating the damage award." *Dowell v. Wells Fargo Bank, N.A.*, 517 F.3d 1024, 1026 (8th Cir. 2008); *see also Cassara v. DAC Servs. Inc.*, 276 F.3d 1210, 1217 (10th Cir. 2002) (statutory damages claim may not be pursued without proof of some actual damages).[5]

As this Court recognized in interpreting another statute, "a guaranteed minimum" statutory damages is "contingent upon some showing of actual damages, thereby avoiding giveaways to plaintiffs with nothing more than abstract injuries. . . ." *Doe v. Chao*, 540 U.S. 614, 625-26 (2004) (citation and internal quotation

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[5] The plaintiff in *TRW, Inc. v. Andrews*, 534 U.S. 19, 33-35 (2001), argued that a FCRA claim does not accrue for statute of limitations purposes until after injury occurs, because injury is an element of the claim; this Court noted the argument but did not rule on its validity. The FCRA provision construed in *TRW*, 15 U.S.C. § 1681p, was subsequently amended. Pub. L. 108-159, § 156, 117 Stat. 1968 (Dec. 4, 2003).

omitted). Likewise, nothing suggests that Congress intended for technical violations of the FCRA, which cause no harm to any specific consumer, to trigger enterprise-threatening statutory damages class actions:

> I worry that the exponential expansion of statutory damages through the aggressive use of the class action device is a real jobs killer that Congress has not sanctioned. To certify in cases where no plaintiff has suffered any actual harm from identity theft and where innocent employees may suffer the catastrophic fallout could not have been Congress's intent. Indeed, the relatively modest range of statutory damages chosen by Congress suggests that bankrupting entire businesses over somewhat technical violations was not among Congress's objectives. Certainly nothing in 15 U.S.C. § 1681n(a)(1) would lead us to believe that Congress intended the modest range of statutory damages to be transformed into corporate death by a thousand cuts through Rule 23.

Stillmock v. Weis Markets, Inc., 385 F. App'x 267, 276 (4th Cir. 2010) (Wilkinson, J., concurring specially); *see also London v. Wal-Mart Stores, Inc.*, 340 F.3d 1246, 1255 n.5 (11th Cir. 2003) (refusing to certify a statutory damages class where the defendant's potential liability "would be enormous and completely out of proportion to any harm suffered by the plaintiff") (citation omitted).

According to the FCRA's legislative history, the statute's main purpose is to "prevent consumers from being *unjustly damaged because of* inaccurate or arbitrary information in a credit report." S. Rep. No.

91-517, at 1 (1969) (emphasis added). To allow a consumer who was not damaged to seek a recovery for a purely legal violation, which did not cause him or her any actual harm, would both violate Article III and contradict Congressional intent. *See Paroline v. United States*, 572 U.S. __, 134 S. Ct. 1710, 1720 (2014) ("this Court has more than once found a proximate-cause requirement built into a statute that did not expressly impose one"); *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 266 (1992) (noting the unlikelihood that Congress intended for literally "all factually injured plaintiffs" to recover under the Racketeer Influenced and Corrupt Organizations Act); *see also Joint Stock Soc'y v. UDV N. Am., Inc.*, 266 F.3d 164, 176 (3d Cir. 2001) (plaintiffs lacked standing under the Lanham Act because they failed to allege that defendants' alleged misconduct "harmed" them and thus lacked "injury in fact") (Alito, J.).

Congress "legislates in the light of constitutional limitations." *Rust v. Sullivan*, 500 U.S. 173, 191 (1991). An injury-in-fact requirement—a "hard floor of Article III jurisdiction that cannot be removed by statute"—therefore should be recognized as part of the FCRA's statutory damages provision. *See Summers*, 555 U.S. at 497; *Douglas v. Cunningham*, 294 U.S. 207, 209 (1935) (copyright statutory damages address the problem of "difficult or impossible proof of damages or discovery of [the defendant's] profits"); *Perrone v. General Motors Acceptance Corp.*, 232 F.3d 433, 436 (5th Cir. 2000) ("statutory damages are reserved for cases in which the damages caused by a violation are small or difficult to ascertain."). It is error to assume, as the Ninth Circuit did, that Congress authorized, in derogation of Article III, potential class action recovery for thousands or even millions of people who

never suffered any "personal and tangible harm." *See Hollingworth*, 133 S. Ct. at 2661.

Certiorari should be granted because if 15 U.S.C. § 1681n(a)(1)(A) lacks an injury-in-fact requirement, it violates Article III of the Constitution.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

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JOINT APPENDIX

Supreme Court, U.S.
FILED
JUL - 2 2015
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No. 13-1339

In the Supreme Court of the United States

SPOKEO, INC.,

Petitioner,

v.

THOMAS ROBINS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED MAY 1, 2014
CERTIORARI GRANTED APRIL 27, 2015

TABLE OF CONTENTS

Relevant Docket Entries in the District Court 1

Relevant Docket Entries in the Ninth Circuit 5

First Amended Complaint 6

The following items are not reproduced in the joint appendix because they have already been reproduced in the petition for a writ of certiorari, at the pages indicated:

Order of the District Court Granting Defendant's Motion to Dismiss Plaintiff's Complaint (Jan. 27, 2011) 11a

Order of the District Court Granting in Part and Denying in Part Defendant's Motion to Dismiss Plaintiff's First Amended Complaint (May 11, 2011) 15a

Order of the District Court "Correcting Prior Ruling and Finding Moot Motion for Certification," and Dismissing the Case (Sept. 19, 2011) 23a

Opinion of the Court of Appeals (Feb. 4, 2014) 1a

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

THOMAS ROBINS, individually and on behalf of all others similarly situated,

Plaintiff,

v.

SPOKEO, INC.,

Defendant.

CV 10-5306 ODW(AGRx)

RELEVANT DOCKET ENTRIES

NO.	DATE	DESCRIPTION
1	7/20/2010	Complaint
22	11/3/2010	Defendant's Motion to Dismiss
30	1/10/2011	Plaintiff's Opposition to Defendant's Motion to Dismiss
31	1/14/2011	Defendant's Response in Support of Motion to Dismiss
35	1/27/2011	Minutes of In Chambers Court Order Granting Motion to Dismiss
40	2/17/2011	First Amended Complaint

NO.	DATE	DESCRIPTION
45	3/17/2011	Defendant's Motion to Dismiss
46	3/17/2011	Defendant's Memorandum in Support of Motion to Dismiss
47	3/17/2011	Defendant's Request for Judicial Notice in Support of Motion to Dismiss
48	3/17/2011	Defendant's Appendix of Relevant Authorities in Support of Motion to Dismiss
49	4/18/2011	Plaintiff's Memorandum in Opposition to Motion to Dismiss
50	5/2/2011	Defendant's Reply in Support of Motion to Dismiss
52	5/11/2011	Minutes of In Chambers Court Order Granting in Part and Denying in Part Motion to Dismiss
54	6/3/2011	Answer to First Amended Complaint
57	6/17/2011	Defendant's Motion to Certify May 11, 2011 Order for Interlocutory Appeal

NO.	DATE	DESCRIPTION
58	6/17/2011	Defendant's Memorandum in Support of Motion to Certify May 11, 2011 Order for Interlocutory Appeal
62	7/18/2011	Plaintiff's Opposition to Defendant's Motion to Certify May 11, 2011 Order for Interlocutory Appeal
63	7/25/2011	Defendant's Reply in Support of Motion to Certify May 11, 2011 Order for Interlocutory Appeal
66	9/19/2011	Minutes of In Chambers Court Order Correcting May 11, 2011 Order, Dismissing Case, and Denying as Moot Motion for Certification for Interlocutory Appeal
67	10/20/2011	Plaintiff's Notice of Appeal
73	3/5/2014	Mandate of Court of Appeals
85	3/19/2014	Minutes of In Chambers Court Order Reopening Case
88	4/18/2014	Amended Answer to First Amended Complaint
89	5/12/2014	Defendant's Motion to Stay Case

NO.	DATE	DESCRIPTION
91	5/19/2014	Plaintiff's Opposition to Defendant's Motion to Stay Case
93	5/23/2014	Defendant's Reply in Support of Motion to Stay Case
94	6/3/2014	Order Denying Motion to Stay Case
107	11/10/2014	Defendant's Motion for Reconsideration of Order Denying Motion to Stay Case
109	11/14/2014	Plaintiff's Notice of Non-Opposition to Defendant's Motion for Reconsideration
111	11/21/2014	Order Granting Motion for Reconsideration and Staying Case

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THOMAS ROBINS, individually and on behalf of all others similarly situated,

Plaintiff-Appellant,

v.

SPOKEO, INC.,

Defendant-Appellee.

No. 11-56843

RELEVANT DOCKET ENTRIES

NO.	DATE	DESCRIPTION
8	6/1/2012	Appellant Thomas Robins's Opening Brief
26	9/20/2012	Appellee Spokeo, Inc.'s Response Brief
32	9/27/2012	Amicus Brief of Experian Information Solutions, Inc.
33	9/27/2012	Amicus Brief of Consumer Data Industry Association
40	11/5/2012	Appellant Thomas Robins's Reply Brief
45	8/12/2013	Supplemental Excerpts of Record
46	8/14/2013	Excerpts of Record
56	2/4/2014	Opinion

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

THOMAS ROBINS, individually and on behalf of all others similarly situated,

Plaintiff,

v.

SPOKEO, INC, a California corporation,

Defendant

Case No. 2:10-cv-5306-ODW-AGR

FIRST AMENDED COMPLAINT FOR:

1. Violations of the Fair Credit Reporting Act, 15 U.S.C. § 1681e
2. Violations of the Fair Credit Reporting Act, 15 U.S.C. § 1681b
3. Violations of the Fair Credit Reporting Act, 15 U.S.C. § 1681j
4. Violation of Cal. Bus. & Prof. Code § 17200 et seq.

DEMAND FOR JURY TRIAL

CLASS ACTION

Plaintiff, by his attorneys, upon personal knowledge as to himself and his own acts and upon information and belief as to all other matters, alleges as follows:

NATURE OF THE ACTION

1. Plaintiff Thomas Robins brings this class action complaint against Defendant Spokeo, Inc. ("Spokeo") for Defendant's collection, creation, and dissemination of consumer reports in violation of the Fair Credit Reporting Act ("FCRA") and other applicable laws.

2. Spokeo operates an eponymously named website—Spokeo.com—which allows users to search for consumers by name, email address, or phone number. In response to a free query, Spokeo provides an in-depth consumer report that displays, among other things, an individual consumer's address, phone number, marital status, approximate age, occupation, approximate household value, hobbies, economic health (previously entitled "credit estimate"), and wealth level. Spokeo provides even more extensive information to paid subscribers.

3. The information contained in Spokeo's consumer reports includes aggregated data collected from a wide range of sources as well as original descriptors, charts, and other content created by Spokeo.

4. Despite Spokeo's practices of compiling, creating and selling consumer reports as described above, the company publicly maintains that it is not a consumer reporting agency.

5. As a result, Spokeo has been unlawfully operating and profiting as a consumer reporting agency since its inception.

PARTIES

5. Plaintiff Thomas Robins is a resident of Vienna, Virginia.

6. Defendant Spokeo, Inc. is a California corporation with its headquarters and principal place of business at 556 S. Fair Oaks Avenue, Suite 101-179, Pasadena, California 91105. Defendant does business throughout the State of California and the nation.

JURISDICTION AND VENUE

8. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1331.

9. Personal jurisdiction and venue are proper because Spokeo is a corporation headquartered in Los Angeles County and/or because the improper conduct alleged herein occurred in, was directed from, and/or emanated or exported from California.

FACTUAL BACKGROUND

Defendant's Process for Generating Consumer Reports

10. Spokeo developed and operates software that allows the company to quickly aggregate data about consumers from a wide range of sources and then organize and display that information to users in an online format.

11. Some of the known sources that Spokeo uses to gather information include: phone books, real estate listings, government records, and social networking websites. However, the company has not publicly disclosed the full list of sources it uses to generate reports about consumers, including the sources it uses to calculate an individual's economic health (previously entitled "credit estimate") and wealth level.

12. While some of Defendant's information stems from third party sources, Defendant exerts total control over its website, meaning, it is in total control of what appears there, and materially contributes to creating the content. In other words, Defendant does not simply host a forum for third parties to add content, but instead created a website to host its own content.

13. Unlike a search engine such as Google or Yahoo, when Defendant returns a search result, it draws conclusions, makes predictions, and otherwise makes factual assertions about the data it returns bearing on a consumer's financial well being and lifestyle choices—conclusions that do not appear in the public or private data that Defendant's search result draws from.

14. Despite the breadth of information it provides about individual consumers, Spokeo attempts to disclaim the use of its services as a method for establishing a consumer's eligibility for credit, employment, or insurance, and further disclaims the use of its reports for any purpose covered by the FCRA.

15. Nevertheless, Spokeo has marketed its services to human resource professionals, law enforcement agencies, persons and entities performing background checks, and publishes individual consumer "economic health" assessments (until recently, Defendant described those assessments as "credit estimates").

The Information Defendant Reports

16. According to Defendant, millions of users search its website for consumer information each day. When a user requests information regarding a particular consumer, Defendant immediately displays numerous pieces of information about that consumer, including the names of their siblings and parents, their address, phone number, marital status, age, employment information, education, ethnicity, items sought from websites such as Amazon.com, and music listened to on websites such as Pandora.com.

17. From this information, whether correctly or incorrectly indentified with the right consumer, Spokeo creates a list of descriptors for that profile such as "seeks opportunity," "is self-driven," "cares about healthy living," "loves to read," "enjoys home decorating," "enjoys shopping," "loves to travel, and many more. (*See* Exhibit A, attached hereto). These descriptors are based on Defendant's own evaluation and analysis of the aggregated data and are not drawn from third parties.

18. In addition to the extensive demographic information Spokeo provides, Spokeo collects economic information and creates colorized charts depicting the consumer's "economic health" (formerly "credit estimate") and "wealth level." The credit estimate/economic health chart originally rated a person from "low" to "high," and now appears with such categories as "below average," "average" and "very strong." Providing even more economic detail, the "wealth" chart places an individual consumer in a specific percentile as compared to other consumers (e.g. "Bottom 40%" or "Top 10%"). (*See* Exhibit B, at-

tached hereto). Defendant does not, however, disclose where it obtains this economic information.

19. Defendant's "economic health" (formerly "credit estimate") and "wealth level" depictions represent original content created by Spokeo that is not independently available from sources other than Defendant. Rather, these financial determinations are the result of independent evaluations by Defendant of data that it collects.

20. Further, until recently, Defendant offered information relating to a consumer's "mortgage value," "estimated income," and "investments." (*See* Exhibit C, attached hereto).

21. Spokeo's reports even provide users with an image of the consumer's purported home address, complete with a corresponding map of his or her neighborhood. The address and neighborhood maps are accompanied by information about how long the consumer has lived at the particular address, the value of the property, and individual property attributes like the existence of fireplaces or swimming pools. (*See* Exhibit D, attached hereto).

22. Although Defendant provides extensive data about consumers, a significant portion of the information that it reports is wholly inaccurate. In fact, the inaccuracies in Spokeo's reports have been the source of much consternation for consumers upset about public mischaracterizations of their employment history, economic background, household value, and the like.[1]

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[1] *See, e.g.*, Spokeo: Meredith Yeomans, Privacy Concerns Over People Search Database Spokeo.com, AZFAMILY.COM, June 1, 2010, http://www.azfamily.com/news/consumer/Privacy-

23. Compounding the inaccuracies in its reports, Spokeo has failed to develop an effective system to allow consumers to remove inaccurate information from their individual reports, or remove the reports from Defendant's website altogether. In May 2009, Defendant's founder—Harrison Tang—gave a statement regarding purported inaccuracies in Defendant's consumer reports. According to Tang, "We know there are a lot of things we need to improve. There are algorithms we can do that we haven't had time to improve the inaccuracies. There's a lot of holes. We know that and we admit that."[2]

24. Indeed, while Defendant purports to allow individuals to remove their Spokeo listings, Spokeo intentionally limits removal requests based on unspecified or nonexistent criteria. Specifically, Spokeo.com frequently responds to individuals who attempt to remove information that: "In order to prevent abuse, we must limit the frequency of privacy requests. Please try again tomorrow. Government officials please your @.gov email address for priority processing." (*See* Exhibit E, attached hereto).

25. Perhaps most telling, Mr. Tang has removed all reports regarding himself from Defendant's website.[3]

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concerns-over-people-search-database-Spokeocom-95374649.html (last accessed February 15, 2011).

[2] Spokeo Web site raising privacy concerns, http://www.ohio.com/business/93220444.html?mobile=true (last accessed February 16, 2011).

[3] You won't find Spokeo founder included on his 'people search' site, http://articles.latimes.com/2010/jun/08/business/la-fiw-lazarus-20100608 (last accessed, February 14, 2011).

Defendant's Marketing of its Consumer Reports

26. While Spokeo disclaims the use of its services for any purposes covered under the FCRA, it has actively marketed it services to employers for the purpose of evaluating potential employees.

27. In support of its "Business Edition" subscriber service, Spokeo advertised that its service provided increased access to candidates' social networking profiles by 'automat[ing] candidate research across 43 social networks." (*See* Exhibit F. attached hereto).

28. Additionally, Defendant placed a list of "Ten Great Uses for Spokeo People Search" on its blog, which included: "want to know more about prospective, or current business associates? Let Spokeo free people search lead the way" and "looking to hire someone, or maybe work for a company? Spokeo free people search is a great research tool to learn more about prospective employers and employees." (*See* FTC Complaint Against Spokeo, Inc., attached hereto as Exhibit G). Since it was originally posted, Defendant has modified this blog post to remove any reference to researching potential employees.

29. The purpose of Defendant's marketing is to encourage HR professionals and potential employers to view Spokeo reports on potential employees, including information relating to credit worthiness, credit capacity, mode of living, personal characteristics, and general reputation and character.

FACTS RELATING TO PLAINTIFF

30. Spokeo maintains an inaccurate consumer report about Plaintiff Robins on its website.

31. The consumer report that Spokeo has compiled about Plaintiff Robins correctly describes his basic identifying information such as address, neighborhood, and siblings' names; however, for an extensive period of time most of the other information was incorrect. For example, a picture Defendant purported to be an image of Robins was not in fact Plaintiff, the profile incorrectly stated he was in his 50s, that he was married, that he was employed in a professional or technical field, and that he has children.

32. While some changes have been made to Plaintiff's profile, it continues to represent that he has a graduate degree, that his economic health is "Very Strong." and that his wealth level in is the "Top 10%."

33. Plaintiff has no way of verifying the "economic health" rating Defendant ascribes to him, and denies that his "wealth level" is accurately described.

34. Defendant's inaccurate report is particularly harmful to Plaintiff in light of the fact that he is currently out of work and seeking employment. In fact, Mr. Robins has been actively seeking employment throughout the time that Spokeo has displayed inaccurate consumer reporting information about him and he has yet to find employment.

35. Defendant has caused Plaintiff actual and/or imminent harm by creating, displaying, and marketing inaccurate consumer reporting information about Plaintiff. Specifically, and in light of the fact that Plaintiff remains unemployed, Defendant has caused actual harm to Plaintiff's employment prospects. This harm is also imminent and ongoing.

36. Because Plaintiff is unemployed, he has lost and continues to lose money.

37. Additionally, Plaintiff has suffered actual harm in the form of anxiety, stress, concern, and/or worry about his diminished employment prospects.

CLASS ALLEGATIONS

38. Plaintiff Robins brings this action pursuant to Fed. R. Civ. P. 23(b)(2) and 23(b)(3) on behalf of himself and a class of similarly situated individuals (the "Class") defined as follows:

> All individuals in the United States who have had information relating to their credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living compiled and displayed by Spokeo, Inc. on Spokeo.com between July 20, 2006 and the date of trial of this action.

Excluded from the Class are Defendant, its legal representatives, assigns, and successors, and any entity in which Defendant has a controlling interest. Also excluded is the judge to whom this case is assigned and the judge's immediate family.

39. The Class consists of millions of individuals, making joinder impractical.

40. Plaintiff's claims are typical of the claims of all of the other members of the Class. Plaintiff and each Class member was affected in substantially the same way by Defendant's unlawful compiling of their personal information for distribution and/or sale to third parties in violation of the FCRA and other applicable law.

41. Plaintiff will fairly and adequately represent and protect the interests of the other members of the Class. Plaintiff has retained counsel with substantial

experience in prosecuting complex litigation and class actions. Plaintiff and his counsel are committed to vigorously prosecuting this action on behalf of the members of the Class, and have the financial resources to do so. Neither Plaintiff nor his counsel has any interest adverse to those of the other members of the Class.

42. Absent a class action, most members of the Class would find the cost of litigating their claims to be prohibitive and will have no effective remedy. The class treatment of common questions of law and fact is also superior to multiple individual actions or piecemeal litigation in that it conserves the resources of the courts and litigants, and promotes consistency and efficiency of adjudication.

43. Defendant has acted and failed to act on grounds generally applicable to Plaintiff and the other members of the Class, requiring the Court's imposition of uniform relief to ensure compatible standards of conduct toward members of the Class.

44. The factual and legal bases of Defendant's liability to Plaintiff and to the other members of the Class are the same, resulting in injury to Plaintiff and all of the other members of the Class. Plaintiff and the other members of the Class have all suffered harm and damages as a result of Defendant's wrongful conduct.

45. There are many questions of law and fact common to Plaintiff's claims and the claims of the other members of the Class. Common questions for the Class include but are not limited to the following:

a) the means and methods by which Defendant compiles, distributes and sells consumer reports to third parties;

b) the extent and duration of Defendant's compilation, distribution, and sale of consumer reports to third parties;

c) the extent to which Defendant transforms, converts and draws conclusions from data collected from unnamed public and private sources;

d) whether Defendant's conduct described herein constitutes a violation of the Fair Credit Reporting Act, 15 U.S.C. §§ 1681 *et seq.*;

e) whether Defendant's conduct described herein constitutes a violation of Cal. Bus. & Prof. Code §§ 17200 *et seq.*; and,

f) whether Defendant unjustly received and/or continues to receive money as a result of its conduct described herein, and whether under principles of equity and good conscience, Defendant should not be permitted to retain those monies.

46. The questions of law and fact common to the members of the Class predominate over any questions affecting only individual members and a class action is superior to all other available methods for the fair and efficient adjudication of this controversy.

47. Plaintiff reserves the right to revise the foregoing "Class Allegations" based on facts learned in discovery.

FIRST CAUSE OF ACTION

Violations of the Fair Credit Reporting Act, 15 U.S.C. § 1681e

(On behalf of Plaintiff and the Class)

48. Plaintiff incorporates by reference the foregoing allegations.

49. The Fair Credit Reporting Act, 15 U.S.C. §§ 1681 *et seq.*, was enacted in 1970 to ensure, among other things, that "consumer reporting agencies" adhere to strict guidelines for maintaining and distributing fair and accurate consumer reports.

50. The FCRA creates a set of individual consumer rights and a private right of action by which to vindicate those rights.

51. Defendant is a "consumer reporting agency" as defined by FCRA because it accepts "monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and...uses...means or facilit[ies] of interstate commerce for the purpose of preparing or furnishing consumer reports." 15 U.S.C. § 1681a(f).

52. Defendant is also a "nationwide specialty consumer reporting agency," as defined by FCRA because it is "a consumer reporting agency that compiles and maintains files on consumers on a nationwide basis relating to (1) medical records or payments; (2) residential or tenant history; (3) check writing history; (4) employment history; or (5) insurance claims." 15 U.S.C. § 1681a(w).

53. The data Defendant compiles and distributes and/or sells to third-parties constitutes a "consumer report" as defined by FCRA because it contains "written, oral, or other communication[s] of ... information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit

capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for (A) credit or insurance to be used primarily for personal, family, or household purposes; (B) employment purposes; or (C) any other purpose authorized under section 1681b of this title." 15 U.S.C. § 1681a(d).

54. Defendant compiles, creates and distributes information to its users about individual consumers including, their "credit estimate" (now "economic health"), "wealth level," as well as occupational and personal characteristic information.

55. Defendant disseminates information bearing on the characteristics enumerated in 15 U.S.C. § 1681a(d). Specifically, by providing information related to consumer's credit estimate, wealth, economic health, investments, mortgage value, home value, median income, and occupation, Defendant is disseminating information bearing on a consumer's credit worthiness, credit capacity, and mode of living. Likewise, by providing information related to a consumer's lifestyle, interests, relationship, hobbies, education, neighborhood, and household amenities, Defendant is disseminating information bearing on a consumer's character, general reputation, personal characteristics, and mode of living. Finally, by disseminating information related to a consumer's ethnicity, religion, and political party, Defendant is disseminating information bearing on a consumer's character and general reputation.

56. Despite Spokeo's clearly defined status as a "consumer reporting agency" and its intent to dis-

seminate "consumer reports," it has publicly attempted to disclaim any obligations under FCRA.

57. Notwithstanding statements by Defendant that information contained on Spokeo.com "may not be used as a factor in establishing a consumer's eligibility for credit, insurance, employment purposes or for any other purpose authorized under the FCRA," Defendant has intentionally marketed its services to human resource professionals, law enforcement agencies, persons and entities performing background checks, and publishes individual consumer "economic health" assessments.

58. Section 1681e(d)(1) of FCRA requires that a consumer reporting agency provide, to any person who regularly and in the ordinary course of business furnishes information about any consumer to the consumer reporting agency ("Furnisher"), a "Notice To Furnishers of Information: Obligations Under the FCRA" ("Furnisher Notice").

59. Section 1681e(d)(2) requires that a consumer reporting agency provide, to any person to whom it provides a consumer report ("Users"), a "Notice to Users of Consumer Reports: Obligations of Users Under the FCRA" ("User Notice").

60. The Furnisher Notices and the User Notices inform Furnishers and Users, of their responsibilities under FCRA, such as a Furnisher's responsibility to provide accurate information or a User's responsibility to provide adverse action notices.

61. Defendant has continually failed to provide Furnisher Notices to Furnishers as required by FCRA.

62. Defendant has further failed to provide User Notices to Users as required by FCRA.

63. Section 1681e(b) mandates that when a consumer reporting agency prepares a consumer report that it shall follow reasonable procedures to assure the maximum possible accuracy of the information concerning the individual about whom the report relates.

64. Defendant has continually failed to follow reasonable procedures to assure the maximum possible accuracy of the information that it provides in its consumer reports.

65. As a result of Defendant's conduct described herein and its willful violations of §§ 1681e(d), 1681e(b), Plaintiff and the Class have suffered harm as described herein. Plaintiff, on his own behalf and on behalf of the Class, seeks an order enjoining Defendant's conduct described herein and awarding himself and the Class the maximum statutory damages available under 15 U.S.C. § 1681n.

SECOND CAUSE OF ACTION

Violations of the Fair Credit Reporting Act, 15 U.S.C. § 1681b

(On behalf of Plaintiff and the Class)

66. Plaintiff incorporates by reference the foregoing allegations.

67. Section 1681b(b)(1) of FCRA mandates that a consumer reporting agency only furnish a consumer report for employment purposes if it ensures that the person who obtains the report complies with certain disclosure requirements ("FCRA disclosures").

68. The FCRA disclosures inform consumers that a consumer report may be used for employment purposes and inform employers that they must provide consumers with certain information if any adverse action is taken based in whole or in part on the report.

69. Defendant promotes its services to employment recruiters and employers for use in making employment decisions.

70. Defendant has furnished consumer reports for employment purposes, but has failed to make the FCRA disclosures required by § 1681b.

71. As a result of Defendant's conduct described herein and its willful violations of §1681b(b), Plaintiff and the Class have suffered harm as described herein. Plaintiff, on his own behalf and on behalf of the Class, seeks an order enjoining Defendant's conduct described herein and awarding himself and the Class the maximum statutory damages available under 15 U.S.C. § 1681n.

THIRD CAUSE OF ACTION

Violations of the Fair Credit Reporting Act, 15 U.S.C. § 1681j

(On behalf of Plaintiff and the Class)

72. Plaintiff incorporates by reference the foregoing allegations.

73. 15 U.S.C. § 1681j(a)(1)(C) directs the Federal Trade Commission ("FTC") to establish streamlined processes for consumers to request free annual file disclosures. The FTC promulgated the Streamlined Process Rule, which is codified at 16 C.F.R. § 610.3. The rule requires, among other things, that a nationwide specialty consumer reporting agency, like

Defendant, provide consumers with a toll-free telephone number to request annual file disclosures and that the telephone number is prominently posted on any website owned or maintained by the nationwide specialty consumer reporting agency, as well as instructions to request disclosures by any additional available request methods. 16 C.F.R. § 610.3(a)(1).

74. Defendant has failed to establish the processes required by the Streamlined Process Rule. In particular, Defendant has failed to post a toll-free telephone number on its website through which consumers can request free annual file disclosures.

75. As a result of Defendant's conduct described herein and its willful violations of §§ 1681j(a)(1)(C) and 1681j(a)(2), Plaintiff and the Class have suffered harm as described herein. Plaintiff, on his own behalf and on behalf of the Class, seeks an order enjoining Defendant's conduct described herein and awarding himself and the Class the maximum statutory damages available under 15 U.S.C. § 1681n.

FOURTH CAUSE OF ACTION

Violation of Cal. Bus. &
Prof. Code § 17200 et seq.

(On behalf of Plaintiff and the Class)

76. Plaintiff incorporates by reference the foregoing allegations.

77. California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code §§ 17200, *et seq.*, protects both consumers and competitors by promoting fair competition in commercial markets for goods and services.

78. The UCL prohibits any unlawful, unfair or fraudulent business act or practice. A business prac-

tice need only meet one of the three criteria to be considered unfair competition. An unlawful business practice is anything that can properly be called a business practice and that at the same time is forbidden by law.

79. As described above, Defendant has violated the "unlawful" prong of the UCL in that Defendant's conduct violates numerous provisions of the FCRA.

80. Defendant has violated the "unfair" prong of the UCL in that it gained an unfair business advantage by failing to produce accurate reports and otherwise take the necessary steps to adhere to FCRA.

81. As a result of Defendant's conduct described herein and its willful violations of Cal. Bus. & Prof. Code § 17203, Plaintiff and the Class have lost money and suffered harm as described herein.

82. Pursuant to Cal. Bus. & Prof. Code § 17203, Plaintiff seeks an order enjoining Defendant from continuing to engage in the unfair and unlawful conduct described herein. Plaintiff seeks an order (1) requiring Defendant to cease the unfair and unlawful practices described herein; and, (2) awarding reasonable costs and attorneys' fees pursuant to Cal. Code Civ. Proc. § 1021.5.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff Thomas Robins, on behalf of himself and the Class, respectfully requests that this Court issue an order:

A. Certifying this case as a class action on behalf of the Class defined above, appointing Thomas Robins as class representative, and appointing his counsel as class counsel;

B. Declaring that Defendant's actions, as set out above, violate the Fair Credit Reporting Act, §§ 1681e, 1681b, 1681j, and Cal. Bus. & Prof. Code §§ 17200 *et seq.*;

C. Award Plaintiff and the Class statutory damages to the maximum extent allowable;

D. Awarding injunctive relief as necessary to cease Defendant's violations of the Fair Credit Reporting Act and Cal. Bus. & Prof. Code §§ 17200 *et seq.*;

E. Award Plaintiff and the Class their reasonable litigation expenses and attorneys' fees;

F. Award Plaintiff and the Class pre- and post-judgment interest, to the extent allowable;

G. Enter such other injunctive and/or declaratory relief as is necessary to protect the interests of Plaintiff and the Class;

H. Award such other and further relief as equity and justice may require.

JURY TRIAL

Plaintiff demands a trial by jury for all issues so triable.

Respectfully submitted.

Dated: February 17, 2010 EDELSON MCGUIRE LLC

By: */s/ SEAN P. REIS*
SEAN P. REIS
One of the Attorneys
for Plaintiff

EXHIBIT A

- Enjoys fitness
- Loves to travel
- Reads about sports
- Has children
- Cares about healthy living
- Enjoys home decorating
- Owns dogs
- Researches investments
- Is self-driven
- Joined a shopping club
- Donates to causes
- Enjoys shopping
- Browses mail catalogs

Job: Lifestyle & Interests

- Plays sports
- Enjoys the outdoors
- Loves reading
- Subscribes to magazines
- Enjoys family activities
- Enjoys gardening
- Owns pets
- Has a swimming pool
- Is a Collector
- Seeks opportunity
- Is not interested in politics
- Donates to environmental issues
- Enjoys retail shopping
- Buys from mail catalogs

EXHIBIT B

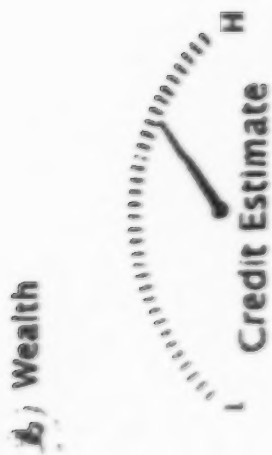

EXHIBIT C

Wealth

L H

Credit Estimate

See available information

[redacted]

Wealth Level

See available information

☑ Mortgage Value ☑ Estimated Income ☑ Investments

See all available wealth information. » Click here

EXHIBIT D

EXHIBIT E

spokeo
Search for a person by name and location
KEEP YOUR PRIVATE INFORMATION PRIVATE.
Remove personal information from the Internet.
Learn more

EXHIBIT F

Want to see your candidates'
profiles on MySpace and LinkedIn?
Enter an email address
People are uncovering surprising details...
The Wall Street Journal

EXHIBIT G

Before the
Federal Trade Commission
Washington, DC 20580

In the Matter of	)
	)
Spokeo, Inc.	)
	)

Complaint and Request for Investigation, Injunction, and Other Relief

I. Introduction

1. The Center for Democracy and Technology submits this complaint to petition the Federal Trade Commission to investigate the recent business practices of Spokeo, Inc., operator of an online data aggregator and broker.

2. Spokeo offers detailed consumer profiles about millions of Americans on its website, Spokeo.com. These profiles include highly personal information, including religious and ethnic background, judgments about shopping and recreational habits, and information about family members and roommates. Spokeo also purports to offer "Credit Estimate" and "Wealth Level" ratings for the millions of persons in its database, as well as information about mortgage values, income, and investments in order to convince people to sign up for the Spokeo's premium paid service. The site also encourages employers to access its database in evaluating potential hires.

3. In fact, Spokeo does not provide much of the data it promises, and other conclusions and facts on the site about consumers are often extremely inaccurate. The site does offer "Credit Estimate" and "Wealth

Level" ratings to paid subscribers, though it does not disclose how and on what information those assessments are based.

4. Despite offering credit ratings and promoting the use of its services for employment decisions, Spokeo does not offer consumers any of the protections encoded in the Fair Credit Reporting Act as required by law. Consumers have no access to the data underlying Spokeo's conclusions, are not informed of adverse determinations based on that data, and have no opportunity to learn who has accessed their profiles.

5. Spokeo's business activities, including the provision of detailed consumer reports without the controls mandated by the Fair Credit Reporting Act, constitute violations of that Act, as well as unfair and deceptive practices in violation of Section 5 of the Federal Trade Commission Act.

II. Parties

6. The Center for Democracy and Technology ("CDT") is a non-profit, public interest organization incorporated in the District of Columbia and operating as a tax-exempt entity. CDT is dedicated to preserving an open, free, and innovative internet, and works on a wide range of online issues, including free expression, consumer privacy, health privacy, security and surveillance, digital copyright, internet openness and standards, international issues, and open government. CDT pursues its mission through public education, grass roots organizing, litigation, and coalition building.

7. Spokeo, Inc. ("Spokeo") owns and operates the site Spokeo.com, which provides detailed consumer profiles about millions of Americans, including information about consumers' credit, wealth, and life-

style. The company offers any visitor to Spokeo.com the opportunity to search and view free profiles of the consumers in its database. Spokeo aggressively promotes its paid service to visitors on the site, whereby consumers pay for a subscription membership to Spokeo in order to access more detailed premium profiles. Spokeo is located in Pasadena, California.[1]

III. Statement of Facts

A. Background about Spokeo

8. Spokeo describes itself as a "search engine specialized in organizing people-related information." Internet users can visit Spokeo.com and search for any person in order to see Spokeo's profile about that individual (users can also search by email address or phone number). Spokeo offers both free and paid versions of each profile. The free version contains more limited (though still quite detailed) information about consumers and contains repeated promotions to encourage searchers to sign up for the paid service. Spokeo offers more substantial profiles to users who sign up for a subscription to Spokeo's service which costs between $2.95 and $4.95 per month (depending on the length of the subscription).[2]

9. On the "About" section of its website, Spokeo describes its data aggregation business:

> Spokeo is a search engine specialized in organizing people-related information from

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[1] Spokeo, About Spokeo, http://www.spokeo.com/blog/about/ (last visited June 25, 2010).

[2] Spokeo, https://www.spokeo.com/purchase (last visited June 10, 2010).

> phone books, social networks, marketing lists, business sites, and other public sources. Most of this data is publicly available on the Web.... That said, only Spokeo's algorithm can piece together the scattered data into coherent people profiles, giving you the most comprehensive intelligence about anyone you want to find.[3]

Spokeo subsequently explains that it "aggregates data from hundreds of online and offline sources."[4]

10. The logo on Spokeo's site features the slogan "Uncover personal photos, videos, and secrets ..."[5]

11. Spokeo is inconsistent about whether all the data it aggregates is otherwise publicly available or not. On its own "About" page, it alternatively says that "all" and "most" of the data it aggregates is publicly available.[6] In press interviews, Spokeo executives have refused to answer questions about its data sources and whether they are publicly available.[7]

12. Spokeo prominently advertises that it offers credit and wealth assessments for all individuals in its database. On each free profile page, Spokeo promotes that it has "Credit Estimate" and "Wealth Level" for paid viewers of the profile, and also promises information about the consumer's mortgage, in-

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[3] Spokeo, About Spokeo, http://www.spokeo.com/blog/about (last visited June 25, 2010).

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] Betty Lin-Fisher, *Spokeo Web site raising privacy concerns*, OHIO.COM, May 9, 2010, http://www.ohio.com/business/93220444.html.

come, and investments. *See infra*, ¶¶ 18-19 and accompanying screenshots.

13. The company also promotes the use of its services in making employment decisions. During at least some of the company's history, the main Spokeo page featured a banner across the front reading, "HR Recruiters — Click Here Now!"[8] Historically, the site also advertised that subscriptions were for "business," "recruiters," and "law enforcement."[9]

14. In a recent Fox Business News interview posted to the Spokeo site, Spokeo President and Co-Founder

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[8] Michael Fertik, *Want to Remove Your Information from Spokeo?*, REPUTATION DEFENDER, Mar. 28, 2010, http://www.reputationdefenderblog.com/2010/03/28/want-to-remove-your- information-from-spokeo/ (see screenshot on page)

[9] *Spokeo: Recruiters' Friend and Job Seekers' Nightmare*, IRISHMAN SPEAKS BLOG, Feb. 23, 2010, http://irishmanspeaks.typepad.com/irishmanspeaks/2010/02/ spokeo-recruiters-friend-and-job-seekers-nightmare.html.

Harrison Tang continues to endorse the use of Spokeo to investigate potential hires:

> Fox Interviewer: "If I'm an employer and I want to hire Harrison Tang, can I just, like, put your name in your system and then everything that you put on MySpace is gonna be sent to me?"
>
> Harrison Tang: "Yes. Actually just enter anyone's e-mail and then we'll basically go through 43 social networks that we support and we'll grab all the profiles, blogs, photos, videos, anything that you can see, basically we'll grab it."
>
> Fox Interviewer: "So, if we're relying on employers to, you know, go look at each one individually, your program is going to make it real easy to find out a lot of information across a lot of different websites very quickly, correct?"
>
> Harrison Tang: That correct. Actually, based on the research in 2005, 23% of the recruiters today is [sic] actually already using one of the social networks for their candidate research. So basically we streamline the process and actually scale it to support 43 social networks."[10]

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[10] *Fox Business News: Speaking About Spokeo* (Fox News television broadcast Dec. 22, 2009). *See also* Jamie Edmonds, *What Does Spokeo Say About You?*,WILX.COM, Apr. 6, 2010 http://www.wilx.com/news/headlines/90057932.html ("The Co-founder of Spokeo, Harrison Tang, told News Ten the site started as a way for Stanford grads to monitor their friends online. It evolved into a 'people search' that recruiters, employers, and even the police are using.")

15. On its blog recently, Spokeo hosted a contest for users to identify the best uses of the Spokeo service. Spokeo announced the #1 winning entry as "To look up people who are potential employers/employees."[11] Spokeo also recently published a blog entry entitled, "Ten Great Uses for Spokeo Free People Search." Two of these ten promoted uses were:

> Want to know more about prospective, or current business associates? Let Spokeo free people search lead the way.
>
> Looking to hire someone, or maybe work for a company? Spokeo free people search is a great research tool to learn more about prospective employers and employees.[12]

16. Spokeo estimates that the site receives "millions of hits per day."[13] The web analytics firm Quantcast ranks Spokeo.com as among the top 250 most visited sites in the United States.[14]

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[11] *We've Got a Winner!*, SPOKEO, June 14, 2010, http://www.spokeo.com/blog/2010/06/weve-got-a-winner/.

[12] *Ten Great Uses for Spokeo Free People Search*, SPOKEO, June 22, 2010, http://www.spokeo.com/blog/2010/06/ten-great-uses-for-spokeo-free-people-search/.

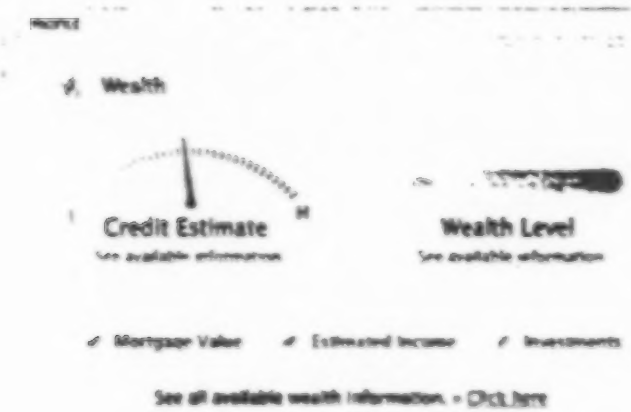
[13] Meredith Yeomans, *Privacy Concerns Over People Search Database Spokeo.com*, AZFAMILY.COM, June 1, 2010, http://www.azfamily.com/news/consumer/Privacy-concerns-over-people-search-database-Spokeocom-95374649.html.

[14] Quantcast Audience Profile for Spokeo.com, http://www.quantcast.com/spokeo.com (last visited June 10, 2010) (Spokeo is ranked 237 in the U.S. based on monthly traffic of approximately 5 million users).

B. What Spokeo Reports About Consumers

17. Spokeo profiles are divided into five sections: "Basic Profile," "Wealth," "Lifestyle and Interests," "Household," and "Neighborhood." Users typically search for these profiles on the Spokeo home page by the consumer's name, though Spokeo also offers its users the ability to search by phone number (Spokeo also offers profiles based on email address, though those profiles are structured differently). *See infra*, ¶ 25 and accompanying screenshot. Under "Basic Profile," Spokeo lists a variety of personal information about the individual, including the person's address, age, religion, education level, occupation, estimated home value, relationship status, number of children, and ethnicity. Spokeo also publishes photographs from social networking sites that may be associated with that person.

18. In the "Wealth" section, Spokeo claims to provide information about creditworthiness, income, and wealth for every person listed within its database. For non-paying users who search for people on the Spokeo service, the "Wealth" section of each profile includes mock charts for "Credit Estimate" and "Wealth Level" and provides links to "see more information." These sections also include a solicitation to "See all available wealth information — click here," with pre-clicked options to see "Mortgage Value," "Estimated Income," and "Investments."



Clicking any of these links (or, indeed, any of the links on any free profile page) takes users to a purchase screen where they can sign up for a paid subscription membership to see the full Spokeo profile of any consumer in the Spokeo database.

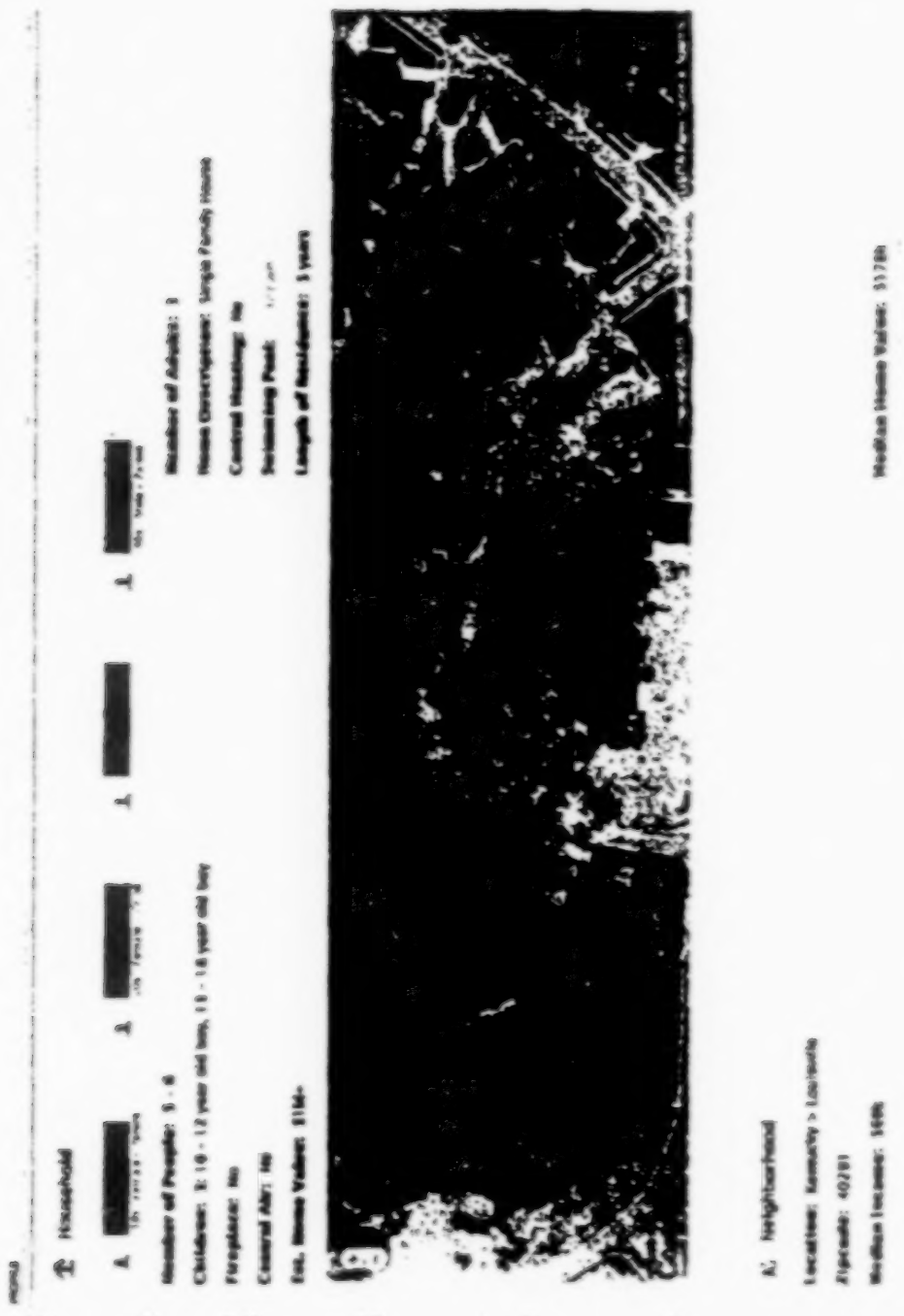
19. If a user signs up for a paid Spokeo subscription to see the more detailed wealth information, all consumer profiles show the actual Spokeo "Credit Estimate" and "Wealth Level" ratings for the consumer, with the consumer placed along continuums ostensibly indicating their relative credit and wealth status.

However, Spokeo does not here or elsewhere provide any information about "Mortgage Value," "Estimated Income," or "Investments" as promised.

20. In the "Lifestyle and Interests" section, Spokeo's paid service provides incredibly precise conclusions about consumers, identifying potentially dozens of assessments about hobbies (such as "enjoys gourmet cooking," "enjoys family activities," or "enjoys casino gambling"), shopping habits ("mail orders DVDs" or "collects sports memorabilia"), reading habits ("reads about history" or "reads about sports"), music listened to ("likes classic music" or "likes soft rock music"), recreational interests ("plays football," "enjoys strolling," or "enjoys scuba diving"), and other personal traits ("owns dogs," "cares about healthy living," or "has children"). As in the "Wealth" and other sections of its profiles, Spokeo does not disclose the underlying data on which it bases these conclusions, including for rather obscure assessments such as "is self driven" and "seeks opportunity."

Users of Spokeo's free service receive similar, though less detailed information, about a consumer's life-style and interests.

21. Under "Household," Spokeo identifies by name the other adults living in the household, how many children (and how old) live in the house, how long the person had lived there, and whether the residence has certain amenities such as central heat, central air, a fireplace, or a swimming pool.



22. Finally, in the "Neighborhood" section, Spokeo provides detailed demographic information about the neighborhood where the searched-for individual

lives. This typically includes median income and home values, and charts depicting age, income, occupation, and ethnicity distribution.

23. In addition to searches by name, Spokeo also allows users to search telephone numbers and email addresses in order to find information about the persons associated with those contacts. If a phone number matches one associated with a consumer profile on Spokeo, Spokeo shows all the information associated with that profile, just as it would if the user had searched an individual by name.

24. Otherwise, Spokeo identifies the carrier that services the phone and purports to assign a real world location associated with the phone (along with a Google satellite view of that location) and demographic information about that location.

25. For searches of email addresses by paid users, Spokeo provides a basic profile associated with the email address (including name, age, gender, and location) and searches to see whether that email address is associated with any of 43 social networking sites on the internet. For unpaid users, Spokeo merely confirms that the email address is "valid," provides a name, and invites users to sign up to see more information associated with that email address. As long as the domain associated with the email address (e.g., yahoo.com or cdt.org) is a real domain, Spokeo will say that the email address is valid and at least strongly imply that the site has extensive information about the email address — even if the email account does not actually exist.

C. Inaccuracies in Spokeo

26. In general, the data provided in these consumer profiles is unreliable. An informal review of profiles associated with CDT employees revealed significant inaccuracies in every single profile. Similarly, Dori Marlin, a consumer protection reporter for the CBS affiliate in Albany, New York conducted a similar re-

view of people in her office and also found serious errors in the majority of profiles.[15] Numerous other writers have detailed similar problems in Spokeo's database.[16]

27. Spokeo founder Harrison Tang has admitted in press interviews that Spokeo is often inaccurate and that site simply hasn't "had time to improve the inaccuracies."[17] Spokeo has attributed the mistakes both to inherent errors in the aggregated data sources,[18] as well as to imperfections in the way that Spokeo's algorithm makes judgments based on that data.[19] The end result is often a portrait of a consumer that bears little relation to reality.

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[15] *The Bottom Line: Spokeo.com*, WRGB CBS 6 Albany, June 1, 2010, http://www.cbs6albany.com/news/website-1274470-bottom-spokeo.html.

[16] Kristin Samuelson, *Should I be worried about Spokeo.com?*, CHICAGO TRIBUNE, May 28, 2010, http://newsblogs.chicago tribune.com/the-problem-solver/2010/05/should-i-be-worried-about-spokeocom.html; Greg Lambert, *Spokeo is Only "Spooky" in its Inaccuracy*, 3 GEEKS AND A LAW BLOG, May 5, 2010, http://www.geeklawblog.com/2010/05/spokeo-is-only-spooky-in-its-inaccuracy.html; *You. Online. Your Privacy. No So Private!*, ALLVOICES, June 25, 2010, http://www.allvoices.com/ contributed-news/6160803-you-online-your-privacy-isnt-private-at-all; Snopes.com, Spokeo, http://www.snopes.com/computer/internet/spokeo.asp (last visited June 28, 2010).

[17] Betty Lin-Fisher, *Spokeo Web site raising privacy concerns*, OHIO.COM, May 9, 2010, http://www.ohio.com/business/93220444.html.

[18] Spokeo, About Spokeo, http://www.spokeo.com/blog/about (last visited June 10, 2010).

[19] See Hannah Garroutte, *Spokeo: A Digital Compilation of Your Life*, NEW ERA NEWS, Apr. 26, 2010, http://neweranews.org/blog/spokeo-a-digital-compilation-of-your-life.

28. As one commentator succinctly put it: "The site is notoriously inaccurate — and people who've paid found a mix of scarily correct and wildly wrong info about themselves."[20]

D. Lack of Consumer Controls on Spokeo

29. Although Spokeo offers detailed — though erratic — insight into millions of American consumers, the site has few controls in place to protect those consumers' rights.

30. Consumers cannot access the underlying data upon which Spokeo bases its broad conclusions about a consumer, including conclusions about a consumer's lifestyle, interests, credit worthiness, and wealth. Although consumers can pay for a membership to see that Spokeo reports that they have "low" credit or "enjoy shopping," they are never given the chance to learn why Spokeo lists those assessments on their profiles.

31. Spokeo also puts no meaningful restrictions on who can access consumer data or what they can do with the information they find on Spokeo, including information about a consumer's credit worthiness. As noted previously, the site encourages visitors to use Spokeo data to evaluate prospective employers, employees, and business associates. *See supra*, ¶¶ 13-15. The site also does not vet in any way potential users of its database: Anyone with an internet connection can access the free information on the Spokeo site; for the more detailed information, in-

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[20] Sheryl Harris, *Data-collecting Sites Scare Users Into Paying*, THE PLAIN DEALER, May 19, 2010, http://www.cleveland.com/consumeraffairs/index.ssf/2010/05/data-collecting_sites_scare_us.html.

cluding the "Credit Estimate" and "Wealth Level" ratings and detailed lifestyle information, Spokeo only requires to pay for a membership using a credit card or PayPal account.

32. Spokeo does not inform its users of any obligation to inform consumers of adverse actions taken by the user as a result of the information obtained on Spokeo.

33. Consumers also do not have the opportunity to correct inaccurate, incomplete, or misleading data about themselves on Spokeo. The company does purport to offer consumers the ability to delete their profiles on the site, although some consumers have stated that this opt out mechanism does not always work.[21] Regardless, even if a consumer does remove his or her profile once, the company may subsequently create a new profile about that individual in the future — indeed, many consumers already have multiple profiles on Spokeo, and removing one does not affect any other. Because Spokeo assembles these profiles of consumers without their knowledge or permission — and because decision-makers who rely on Spokeo data are not required or directed to give consumers notice of adverse actions — most consumers would have no reason to know about or visit the site in order to delete their profiles.

34. Spokeo does provide an inconspicuous grey-on-white disclaimer that Spokeo information should not be used for FCRA purposes. This notice appears at the bottom of each profile, immediately beneath aggregate demographic data about where the searched-

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[21] Snopes.com, Spokeo, http://www.snopes.com/computer/internet/spokeo.asp (last visited June 28, 2010).

for individual lives — information that an ordinary user would likely find less compelling that the detailed individual profile of the person searched. (For disclosure in context of consumer profile, *see supra*, ¶ 22 and succeeding screenshot).

Spokeo also puts a disclaimer within its "Terms of Use" that "Spokeo is not a 'consumer reporting agency' as defined in the Fair Credit Reporting Act." However, Spokeo never explains the import of that term, or explains what uses are prohibited by that Act.[22]

35. In short, individuals listed in the Spokeo database have no opportunity to find out who is accessing these detailed profiles about themselves, or to what purposes the profiles are being used. Even if they learn about Spokeo, and pay for a subscription to view the most detailed information about themselves, they only see broad conclusions, and not the underlying data on which those conclusions are based. Spokeo gives them no opportunity to petition the site to correct the information listed about them on the site. Consumers are only given an imperfect mechanism to delete their profiles, though most of those consumers would have no reason to know about or visit Spokeo to do so. Meanwhile, employers and other decision-makers may be relying on Spokeo's credit, wealth, and lifestyle data in making

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[22] Spokeo, *Terms of Use*, http://www.spokeo.com/blog/terms/ (last visited June 25, 2010).

adverse determinations about consumers without their awareness.

E. CDT Consultations with Spokeo

36. CDT sent Spokeo a message through the Spokeo.com customer service web form on June 2, 2010 stating that we had concerns about the information readily available about consumers on the company's website. We received a response that day from Katie Johnson of Spokeo asking for a summary of our issues and an offer to speak with the company's co-founder, Harrison Tang. On June 3, CDT sent an email to Ms. Johnson stating that CDT believed that Spokeo should offer consumers the protections required by the Fair Credit Reporting Act, including rights of access and correction. CDT and Spokeo scheduled a call with Mr. Tang for June 9; however, Spokeo canceled the call one day before it was to occur. CDT offered to reschedule the call for another time, but Spokeo declined our request.

IV. Grounds for Relief

37. The Fair Credit Reporting Act ("FCRA") provides that the FTC shall have the authority to investigate and enforce violations of the Act.[23] Section 5 of the Federal Trade Commission Act provides that "unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful."[24] When the Commission has reason to believe that any person has used or is using unfair or deceptive practices in or affecting commerce, it shall issue a complaint against such person in an administrative proceeding,

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[23] Fair Credit Reporting Act, 15 U.S.C. § 1681s(a)(1) (2006).

[24] Federal Trade Commission Act § 5, 15 U.S.C. § 45(a)(1) (2006).

if it believes such a proceeding to be in the public interest.[25]

38. Spokeo has published detailed consumer reports about millions of consumers. Although these reports often contain glaring inaccuracies, Spokeo has marketed them for use in employment decisions, and claims to offer qualitative assessments of consumers' credit and wealth levels based on this data.

39. Although Spokeo's reports classify as "consumer reports" under the terms of the Fair Credit Reporting Act, Spokeo does not offer consumers the consumer protections dictated by that statute, including rights of access, redress, and notification of adverse decisions. As such, Spokeo's offering of these reports constitutes a violation of the FCRA, as well as unfair business practices under Section 5 of the FTC Act. Moreover, Spokeo has committed deceptive practices under Section 5 as well, in offering these admittedly flawed reports to the public, and in falsely inducing consumers to sign up for paid services by marketing of meaningless or nonexistent information about credit worthiness, wealth, income, investments, and other information.

A. The Fair Credit Reporting Act

40. The Fair Credit Reporting Act requires that companies that generate reports about consumers for certain purposes must abide by a threshold of consumer protections. The statute stands for the principle that if data brokers are going to make available incredibly detailed profiles about consumers upon which others may rely in making credit, employment, and other important decisions, those data bro-

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[25] *Id.* § 45(b).

kers should follow certain rules to protect the privacy rights of consumers and to ensure that consumer information is reported fairly and accurately.

41. Spokeo provides the types of detailed consumer profiles that FCRA was designed to cover — profiles that provide precise evaluations of a consumer's creditworthiness and lifestyle. Nevertheless, the company does not offer consumers any of the protections afforded by the law.

42. FCRA was passed in 1970 in response to a pattern of abuse and misinformation by the consumer reporting industry.[26] In addition to highly inaccurate reports, Congress was concerned that data brokers were reporting conclusions about consumers' "lifestyle," including assessments about marital status.[27] The Act opens with the following findings:

> The Congress makes the following findings:
>
> 1. The banking system is dependent upon fair and accurate credit reporting. Inaccurate credit reports directly impair the efficiency of the banking system, and unfair credit reporting methods undermine the public confidence which is essential to the continued functioning of the banking system.
>
> 2. An elaborate mechanism has been developed for investigating and evaluating the credit worthiness, credit standing, credit ca-

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[26] Letter dated Dec. 16, 2004, from Chris Jay Hoofnagle and Daniel J. Solove to Federal Trade Commission, http://epic.org/privacy/choicepoint/fcraltr12.16.04.html.

[27] *Id.*

pacity, character, and general reputation of consumers.

3. Consumer reporting agencies have assumed a vital role in assembling and evaluating consumer credit and other information on consumers.

4. There is a need to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy.[28]

43. Because the Fair Credit Reporting Act is remedial legislation, courts have held that it is to be construed liberally in favor of consumers.[29] The FTC has been aggressive in bringing FCRA cases in recent years in order to protect consumers and curb the excesses of the data broker industry.[30]

44. The Fair Credit Reporting Act imposes a range of baseline protections to safeguard consumer privacy

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[28] Fair Credit Reporting Act, Pub. L. No. 91-508, § 602, 84 Stat. 1114, 1128 (codified at 15 U.S.C. § 1681(a)(1)-(4) (2006)).

[29] *See, e.g.*, *Lewis v. Ohio Prof'l Elec. Network LLC*, 190 F. Supp. 2d 1049, 1056 (S.D. Ohio 2002)

[30] *See, e.g.*, Complaint, *United States v. Choicepoint Inc.*, Civil Action No. 2:06-CV-00041 (TC), FTC File No. 052-3069 (Jan. 26, 2006); Complaint, *United States v. Far West Credit Inc.*, FTC File No. 042-3185 (Jan. 17, 2006); Press Release, FTC, Choice Point Settles Data Security Breach Charges; to Pay $10 Million in Civil Penalties, $5 Million for Consumer Redress (Jan. 26, 2006), http://www.ftc.gov/opa/2006/01/choice point.shtm; Press Release, Federal Trade Commission, Credit Reporting Agency Settles FTC Charges (Jan. 17, 2006), http://www.ftc.gov/opa/2006/01/farwestcredit.shtm (Far West Credit to pay $120,000 in civil penalties).

and ensure that credit and character data about consumers is collected and reported fairly and accurately. These protections include: the right to access consumer report data about oneself,[31] the right to petition the consumer reporting agency to correct incorrect data,[32] a time limitation on how long negative financial information may remain on a consumer's record,[33] and a limitation on who can access a report about a consumer.[34]

45. Spokeo clearly does not provide any of these protections to consumers. *See supra*, ¶¶ 29-35. As such, Spokeo is in violation of the Fair Credit Reporting Act if they are deemed to be a consumer reporting

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[31] 15 U.S.C. § 1681g(a); Press Release, FTC, Tenant Screening Agency Settles FTC Charges: Failed to Respond to Consumers' Requests for Their Files or Investigate Disputes (Feb. 2, 2010), http://www.ftc.gov/opa/2010/02/saferent.shtm.

[32] 15 U.S.C. § 1681s-2(a)(1)(B)(i); *Bryant v. TRW, Inc.* 689 F.2d 72, 78-79 (6th Cir. 1982) (consumer may challenge negative information and credit reporting agencies must use reasonable procedures to investigate complaints); Press Release, FTC, Nation's Big Three Consumer Reporting Agencies Agree to Pay $2.5 Million to Settle FTC Charges of Violating Fair Credit Reporting Act (Jan. 13, 2000), http://www.ftc.gov/opa/2000/01/busy signal.shtm (consumer reporting agencies must provide reasonable opportunity for consumers to discuss credit report errors).

[33] 15 U.S.C. § 1681c(a)(1)-(5); Press Release, FTC, NCO Group to Pay Largest FCRA Civil Penalty to Date (May 13, 2004), http://www.ftc.gov/opa/2004/05/ncogroup.shtm (outdated debts may not appear on a credit report).

[34] 15 U.S.C. § 1681b(a). Press Release, FTC, ChoicePoint Settles Data Security Breach Charges; To Pay $10 Million in Civil Penalties, $5 Million in Consumer Redress (January 26, 2006), http://www.ftc.gov/opa/2006/01/choicepoint.shtm (data broker fined for providing consumer reports to persons with no permissible FCRA purpose).

agency under that statute's definition which provides:

> The term "consumer reporting agency" means any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports.[35]

46. Spokeo clearly meets three parts of the four-part definition of "consumer reporting agency": Spokeo (1) for fees, (2) assembles information on consumers, and (3) utilizes interstate commerce. The only question, then, is whether Spokeo's reports are "consumer reports."

47. FCRA defines the term "consumer report" as such:

> The term 'consumer report' means any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living, which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for (A) credit or insurance to be used primarily for per-

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[35] 15 U.S.C. § 1681a(f).

> sonal, family, or household purposes; (B) employment purposes; or (C) any other purpose under Section 604 [15 U.S.C. § 1681b].[36]

48. The "other purposes" listed in Section 604 [15 U.S.C. § 1681a] repeat again the credit[37] and employment[38] purposes, and also include:

- insurance for the consumer[39]
- eligibility for a government benefit[40]
- assessment of a consumer's existing credit risk by potential investor or servicer of an existing consumer debt[41]
- a "legitimate business need" in connection with a transaction initiated by the consumer.[42]

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[36] 15 U.S.C. § 1681a(d)(1) (2006). A consumer profile must only address one of the purposes under the statute in order to qualify as a "consumer report." *See* FTC Staff Opinion Letter dated June 11 1998, from William Haynes to Matthew B. Halpern, http://www.ftc.gov/os/statutes/fcra/halpern.shtm.

[37] *Id.* § 1681b(a)(3)(A).

[38] *Id.* § 1681b(a)(3)(B).

[39] *Id.* § 1681b(a)(3)(C).

[40] *Id.* § 1681b(a)(3)(D).

[41] *Id.* § 1681b(a)(3)(E).

[42] *Id.* § 1681b(a)(3)(F). The Federal Trade Commission and the courts have traditionally interpreted this last provision broadly to encompass a wide range of scenarios where a business determines a consumer's eligibility for a good or service — or even price for a good or service — based in part on such as report. *See* Commentary on the Fair Credit Reporting Act, 16 C.F.R. Pt. 600 (Comment to Section 604(3)(E)) (2010) (stating that "legitimate business purposes" would extend to rental tenant screening, offers to pay for goods with a check, and even oppor-

49. Given the detailed consumer profiles created by Spokeo, the company should reasonably expect that users would utilize the information provided for the purposes specified in the statute. Certainly, it is difficult to envision what Spokeo's "Credit Estimate" ratings would be likely to be used for other than credit purposes. Indeed, FCRA imposes specific additional requirements on data brokers that provide credit scores (also known as "risk scores" or "risk predictors") that place consumers on a relative continuum of credit worthiness.[43] Allowing Spokeo and other companies to offer for sale specific credit ratings about consumers without following the dictates of FCRA would utterly defeat the purpose of the statute.

50. Spokeo's profiles are "consumer reports" even if they are based on entirely "public" information (*but see supra*, ¶ 11). First, FCRA's definition contains no exception for profiles based in whole or in part on publicly reported information, and the FTC has regularly stated that reports that contain only public data fall within the scope of "consumer reports" under the act. As the FTC wrote in a staff opinion letter directly addressing this very issue:

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tunity to use a computer dating service); FTC Staff Opinion Letter dated June 10, 1998, from William Haynes to Mary Poquette, http://www.ftc.gov/os/statutes/fcra/poquette.shtm; Press Release, FTC, Spring, AT&T to Pay Nearly $1.5 Million in Combined Penalties for Violations of Federal Credit Laws, (Sept. 10, 2004) http://www.ftc.gov/opa/2004/09/sprintatt.shtm (FTC settlement regarding use of consumer reports for eligibility for phone service); *see also Safeco Insurance Co. of America v. Burr*, 551 U.S. 47 (2007) (interpreting "adverse action" under FCRA broadly to apply to price discrimination).

[43] *E.g.*, 15 U.S.C. § 1681g(f).

> Is a commercial service that reports only "public record" information a consumer reporting agency (CRA)? An entity that meets the definitional requirement for a "consumer reporting agency" (CRA) in Section 603(f) of the FCRA is covered by the law even if the only information it collects, maintains, and disseminates is obtained from "public record" sources.[44]

51. For example, the FTC has always assumed the companies that merely provide public information about consumer's criminal records constitute consumer reporting agencies under the terms of the Fair Credit Reporting Act:

> A "consumer report" is, in turn, defined in Section 603(d)(1) as a report containing information bearing on an individual's credit standing or his or her "character, general reputation, personal characteristics, or mode of living" that is used or expected to be used for the purpose of serving as a factor in establishing the consumer's eligibility for, among other things, employment, insurance, or credit.
>
> You do not contest that your company meets most of the definitional requirements of a CRA: It regularly provides consumer report information (criminal records that, at the very least, concern an individual's character

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[44] FTC Staff Opinion Letter dated Sept. 15, 1999, from William Haynes to Sylvia Sum, http://www.ftc.gov/os/statutes/fcra/sum.shtm; Commentary on the Fair Credit Reporting Act, 16 C.F.R. pt. 600 (Comment to Section 603) (2010) (section on "public record information").

or general reputation) to third parties for fees using interstate commerce.[45]

52. Second, even if all the data was collected from public or previously published sources, the algorithms for determining Spokeo's conclusions about "Credit Estimate" and "Wealth Level" ratings — not to mention other specific judgments about lifestyle, hobbies, interests, and other proclivities — are not public, nor is a consumer told upon what specific allegedly public facts Spokeo's conclusions are based. Rather, Spokeo represents an absolute black box for consumers — generating highly detailed analyses of consumers based on uncertain facts and reasoning.

53. Placing inconspicuous disclaimers on profile pages that the reports are not to be used for FCRA purposes does not exempt Spokeo profiles from the scope of the law. Data and conclusions that are likely to be used for — and, in the case of credit estimates, could only reasonably be used for — FCRA purposes are still subject to the rules proscribed in the statute. Hidden directives not to use the information for FCRA purposes have no practical effect on user's behavior and only serve as a transparent effort to avoid FCRA's baseline consumer protections. Data brokers cannot blatantly offer credit estimates and other detailed judgments about consumers and then simply

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[45] FTC Staff Opinion Letter dated June 9, 1998, from William Haynes to Richard LeBlanc, http://www.ftc.gov/os/statutes/fcra/leblanc.shtm; *accord* FTC Staff Opinion Letter dated June 11, 1998, from William Haynes to Sidney F. Lewis, http://www.ftc.gov/os/statutes/fcra/lewis.shtm; FTC Staff Opinion Letter dated June 9, 1998, from William Haynes to David G. Isinger, http://www.ftc.gov/os/statutes/fcra/isinger.shtm.

aver themselves out of the scope of the law.[46] This must especially the case when the company is actively promoting the use of its services for FCRA-covered purposes such as employment decision. *See supra* ¶¶ 13-15.[47] In other cases, the FTC has required that companies who offer consumer reports provide "clear and prominent" notices of the limited permissible purposes for which consumer reports may be used and the incumbent obligations imposed upon companies who make adverse determinations based on those reports.[48]

B. Unfairness

54. For the reasons cited above, Spokeo's furnishing of detailed conclusions about consumers for credit, employment, and other purposes constitute an unfair practice under the FTC Act.

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[46] *See Marricone v. Experian Information Solutions, Inc.*, 2009 U.S. Dist. LEXIS 93003 (E.D. Pa. Oct. 6, 2009) (E.D. Pa. 2009) (rejecting data brokers' argument that it was not "consumer reporting agency" as matter of law). *See also Payne v. Trans Union, LLC*, 2010 US Dist LEXIS 32320 (E.D. Pa Mar 31, 2010) (accord) *Breslin v. Trans Union, LLC*, No. 08-2236 (E.D. Pa. 2009) (accord).

[47] *See* Commentary on the Fair Credit Reporting Act, 16 C.F.R. Pt. 600 (Comment to Section 604(5)(D)) (2010) (stating that consumer profiles are "consumer reports" unless reporter takes "reasonable steps" to ensure reports are not being used for FCRA purposes).

[48] Press Release, FTC, Consumer Reporting Agency TALX Corp. Agrees to Settle FTC Charges (July 9, 2009), http://www.ftc.gov/opa/2009/07/talx.shtm; Press Release, FTC, Consumer Reporting Agency for Casinos Settles FTC Charges (April 22, 2010), http://www.ftc.gov/opa/2010/04/centralcredit.shtm.

55. A practice will be deemed unfair and illegal under this Section if it (1) causes or is likely to cause substantial injury to consumers; (2) cannot be reasonably avoided by consumers; and (3) is not outweighed by any countervailing benefits to consumers or competition that the practice produces.[49]

56. Certainly, if decision-makers rely on Spokeo's unreliable database in making important decisions — as Spokeo has encouraged — consumers are likely to experience substantial harm in being unfairly denied employment and other opportunities. Indeed, recognition of this harm was the very reason Congress passed the Fair Credit Reporting Act in 1970, finding: "There is a need to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy."[50]

57. This injury cannot be reasonably avoided by consumers. In all likelihood, the considerable majority of Americans have no awareness at all about the Spokeo database, and Spokeo does not direct persons who make adverse determinations about consumers based on its assessments to notify consumers.[51] Spokeo does not ask or receive consumers' permission to publish these detailed profiles about them. For those who do learn about Spokeo, the site does not provide access to the underlying data or method-

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[49] 15 U.S.C. § 45(n) (2006); FTC Policy Statement on Unfairness (1980), *appended to International Harvester Co.*, 104 F.T.C. 949, 1070 (1984), *available at* http://www.ftc.gov/bcp/policystmt/adunfair.htm.

[50] Fair Credit Reporting Act, Pub. L. No. 91-508, § 602, 84 Stat. 1114, 1128 (codified at 15 U.S.C. § 1681(a)(1)-(4) (2006)).

[51] 15 U.S.C. § 1681e(d)(2) (2006).

ology behind its reports, notice of who has accessed the reports about them, or a meaningful opportunity to correct errors.

58. Finally, the injury to consumers is not outweighed by any benefit to consumers or competition. Spokeo's "Credit Estimates" and "Wealth Levels" offer no benefit to consumers without the consumer protections encoded into law by the Fair Credit Reporting Act. In the absence of these protections, Spokeo offers detailed conclusions about consumers' credit, wealth, and lifestyles with little or no factual grounding (and no opportunity to discern or correct whatever grounding exists). Consumers do not benefit from data brokers publishing inaccurate, opaque, and unsubstantiated assessments relating to their creditworthiness and employability.

C. Deceptive Practices

59. Spokeo has also committed deceptive practices by offering detailed profiles of consumers with apparently minimal factual support, and in attempting to induce users to sign up for Spokeo's paid service by overstating the amount of information Spokeo provides.

60. The *FTC Policy Statement on Deception* provides that the Commission will find deception if there is a representation, omission, or practice that is likely to mislead the consumer acting reasonably under the circumstances, to the consumer's detriment.[52]

61. First, Spokeo's profiles themselves are inherently deceptive. Spokeo publishes detailed conclusions

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[52] FTC Deception Policy Statement, *appended to Cliffdale Associates*, 103 F.T.C. 174 (1984), *available at http://www.ftc.gov/bcp/policystmt/ad-decept.htm*.

about consumers, including precise conclusions about religious preferences, ethnicity, hobbies, lifestyle, relationship status, credit levels, and wealth. Spokeo moreover advises others to rely on this data for credit, employment, and other purposes. Spokeo does not make available the information on which it bases these broad conclusions, so users are invited to take the claims at face value.

62. Spokeo has admitted in press interviews that its assessments are inaccurate. *See supra*, ¶ 27. It appears that Spokeo is these detailed conclusions about consumers with little or no factual basis; in effect, Spokeo is representing to users that it knows far more about its data subjects than is actually the case. Inconspicuous disclosures at the bottom of each page and elsewhere on the Spokeo site that the data "is not guaranteed to be 100% accurate" are insufficient to counteract a consumer's reasonable expectation when reviewing Spokeo profiles. *See supra* ¶¶ 22 & 34 and accompanying screenshots.

63. Spokeo also intentionally misleads consumers in order to trick them into signing up for the paid service.

64. For email searches, Spokeo also deceptively indicates that any email address coming from a legitimate web domain is a "valid email address," and strongly implies that the site has substantial information on nonexistent email addresses, including the real name and photographs of the owner. *See supra*, ¶ 25 and accompanying screenshot.

65. When advertising available wealth information on its free profiles, Spokeo promises to provide "Credit Estimates," "Wealth Levels," mortgage value, estimated income, and investments. *See supra*, ¶¶ 18-

19 and accompanying screenshots. When users actually sign up for the service, Spokeo provides no information at all about mortgage values, estimated incomes, or investments. Moreover, the ratings it provides regarding "Credit Estimates" and "Wealth Levels" have little or no grounding in reality. In fact, in a blog entry on its site entitled "Clearing the Air," Spokeo admits that it doesn't actually have specific financial information about any individual:

> We do not have credit information, including exact credit scores and wealth ratings. We do not know the balance of your bank account. **In fact, we don't have any specific private financial information about anyone.**

(emphasis added).[53]

V. Request For Injunction And Other Relief

66. Based on Spokeo's willful violations of the Fair Credit Reporting Act, and willful commission of unfair and deceptive business practices, CDT asks the Commission to:

- Order Spokeo to cease offering consumer reports until they offer the protections encoded in the Fair Credit Reporting Act;

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[53] *Clearing the Air*, SPOKEO, May 12, 2010, http://www.spokeo.com/blog/2010/05/clearing-the-air/. Spokeo's President Harrison Tang confirmed as much in a recent interview: "I want to clarify very clearly that we do not have people's credit information. We do not have people's credit card information, we do not have people's bank account information. We do not have any private financial information about anybody." Connie Thompson, *Website Creates Virtual Online Bio of Anyone*, KOMONEWS.COM, May 4, 2010, http://www.komonews.com/news/consumer/92832789.html.

- Enjoin Spokeo from making deceptive solicitations to consumers in order to induce them to sign up for Spokeo's paid services;
- Order Spokeo to pay restitution to consumers who paid for Spokeo's consumer reporting service;
- Order Spokeo to pay disgorgement of any monies received that are reasonably related to its deceptive, unfair, and illegal provision of data aggregation services;
- Order Spokeo to pay penalties pursuant to the Fair Credit Reporting Act; and to
- Provide such other relief as the Commission finds necessary and appropriate.

Respectfully Submitted,

Justin Brookman

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PETITIONER'S BRIEF

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In the Supreme Court of the United States

SPOKEO, INC.,

Petitioner,

v.

THOMAS ROBINS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTION PRESENTED

Whether Congress may confer Article III standing upon a plaintiff who suffers no concrete harm, and who therefore could not otherwise invoke the jurisdiction of a federal court, by authorizing a private right of action based on a bare violation of a federal statute.

RULE 29.6 STATEMENT

Petitioner Spokeo, Inc., has no parent company. No publicly held company owns 10% or more of Spokeo.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i
RULE 29.6 STATEMENT ii
TABLE OF AUTHORITIES vi
OPINIONS BELOW 1
JURISDICTION 1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1
STATEMENT 1
A. The Fair Credit Reporting Act. 3
B. Spokeo's Search Engine. 3
C. Respondent's Lawsuit. 4
D. Proceedings In The District Court. 5
E. The Court of Appeals' Decision. 6
SUMMARY OF THE ARGUMENT 7
ARGUMENT 11
I. THE CONSTITUTION'S INJURY-IN-FACT REQUIREMENT IS NOT SATISFIED BY AN INJURY IN LAW UNACCOMPANIED BY CONCRETE HARM. 11
A. This Court Has Consistently Held That Congress May Not Vitiate Article III's Requirement Of Injury In Fact. 13
B. The Constitution's Text And History—And The Controlling Common Law Background—Establish That Concrete Harm Is Essential For A Dispute To Qualify As A "Case" Or "Controversy." 17

TABLE OF CONTENTS—continued

Page

1. Article III, Section 2 Limits The Federal Judicial Power To Disputes The Framers Would Have Recognized As Appropriate For Resolution By Courts. 18
2. The English Legal Tradition Confined The Courts' Authority To Disputes Involving Concrete Harms. 20
3. Separation-Of-Powers Principles Limit The Judicial Power To Cases Involving Concrete Harm 26
   a. The Concrete Harm Requirement Ensures That The Judiciary Does Not Exceed Its Limited Role 27
   b. Requiring Private Plaintiffs To Demonstrate Concrete Injury Prevents Congress From Delegating Executive Power To Private Parties. 28
   c. Maintaining Judicial And Executive Powers In Their Proper Spheres Is Essential To Protect Individual Liberty. 31
   d. The Class-Action Device Heightens Separation-Of-Powers Concerns. 32

C. The FCRA Violations That Respondent Alleges Do Not Satisfy Article III's Concrete Harm Standard. 36

TABLE OF CONTENTS—continued

Page

1. A Legal Violation Without Concrete Harm Cannot Satisfy The Injury-In-Fact Standard.....36
   a. A Legal Violation Cannot Substitute For Concrete Harm.....36
   b. This Court Has Never Found Injury In Fact In The Absence Of Concrete Harm.....40
2. A Right To Recover Statutory Damages Cannot Substitute For Concrete Harm.....47
3. Respondent Cannot Avoid The Concrete Harm Requirement By Analogizing His Claim To Common Law Defamation Actions.....49
4. Respondent's Allegations Fall Far Short Of The Required Concrete Harm.....52

II. THE FCRA SHOULD NOT BE CONSTRUED TO PERMIT SUITS WITHOUT PROOF OF CONCRETE HARM.....53

CONCLUSION.....57

APPENDIX: Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.*.....1a

TABLE OF AUTHORITIES

Page(s)

CASES

Aetna Life Ins. Co. v. *Haworth*,
300 U.S. 227 (1937) 45

Allen v. *Wright*,
468 U.S. 737 (1984) 27, 41

American Express Co. v. *Italian Colors Rest.*,
133 S. Ct. 2304 (2013) 33

Arizona Christian Sch. Tuition Org. v. *Winn*,
131 S. Ct. 1436 (2011) 32, 35, 39

Ashby v. *White*,
1 Brown 62, 1 Eng. Rep. 417
(H.L. 1704) 24

Ashby v. *White*,
2 Ld. Raym. 938, 92 Eng. Rep. 126
(Q.B. 1703) 25

Ashby v. *White*,
6 Mod. 45, 87 Eng. Rep. 808
(Q.B. 1703) 24, 25

Ashby v. *White*,
17 J. House L. 526 (1704) 24

Atkinson v. *Teasdale*,
3 Wils. K.B. 282, 95 Eng. Rep. 1054
(C.P. 1772) 23

AT&T Mobility LLC v. *Concepcion*,
131 S. Ct. 1740 (2011) 34

TABLE OF AUTHORITIES—continued

Page(s)

Bateman v. *American Multi-Cinema, Inc.*,
623 F.3d 708 (9th Cir. 2010) 33

Berger v. *United States*,
295 U.S. 78 (1935) 30

Black v. *Thorne*,
111 U.S. 122 (1884) 46

Blake v. *Robertson*,
94 U.S. 728 (1876) 46

Bond v. *United States*,
131 S. Ct. 2355 (2011) 32

Bond v. *United States*,
134 S. Ct. 2077 (2014) 54

Boumediene v. *Bush*,
553 U.S. 723 (2008) 54

Bower v. *Hill*,
1 Bing. N.C. 549, 131 Eng. Rep. 1229
(C.P. 1835) 26

Bowsher v. *Synar*,
478 U.S. 714 (1986) 32

Cable v. *Rogers*,
3 Bulst. 312, 81 Eng. Rep. 259
(K.B. 1625) 23

Califano v. *Yamasaki*,
442 U.S. 682 (1979) 35

Carey v. *Piphus*,
435 U.S. 247 (1978) 46, 51

TABLE OF AUTHORITIES—continued

Page(s)

Chicago & Grand Trunk Ry. v. *Wellman*, 143 U.S. 339 (1892) 31

Clapper v. *Amnesty Int'l USA*, 133 S. Ct. 1138 (2013) 10, 52, 53

Clinton v. *City of New York*, 524 U.S. 417 (1998) 32

Coleman v. *Miller*, 307 U.S. 433 (1939) 18, 20, 25

Crogate v. *Morris*, 1 Brown. & Golds. 197, 123 Eng. Rep. 751 (C.P. 1611) 23

Crown Die & Tool Co. v. *Nye Tool & Mach. Works*, 261 U.S. 24 (1923) 46

DaimlerChrysler Corp. v. *Cuno*, 547 U.S. 332 (2006) 27

Diamond v. *Charles*, 476 U.S. 54 (1986) 47

Doe v. *Chao*, 540 U.S. 614 (2004) 56

Douglas v. *Cunningham*, 294 U.S. 207 (1935) 48

Edwards v. *First American Corp.*, 610 F.3d 514 (9th Cir. 2010), cert. granted, 131 S. Ct. 3022 (2011), cert. dismissed as improvidently granted, 132 S. Ct. 2536 (2012) 6

TABLE OF AUTHORITIES—continued

Page(s)

Evers v. *Dwyer*,
358 U.S. 202 (1958) 41

FEC v. *Akins*,
524 U.S. 11 (1998) 42, 43

Feltner v. *Columbia Pictures Television, Inc.*,
523 U.S. 340 (1998) 49

Fox Film Corp. v. *Doyal*,
286 U.S. 123 (1932) 49

Friends of the Earth, Inc. v. *Laidlaw Envtl. Servs., Inc.*,
528 U.S. 167 (2000) 12, 29, 37

Fuentes v. *Shevin*,
407 U.S. 67 (1972) 32

Gertz v. *Robert Welch, Inc.*,
418 U.S. 323 (1974) 51

Gladstone, Realtors v. *Village of Bellwood*,
441 U.S. 91 (1979) 13

Goss v. *Lopez*,
419 U.S. 565 (1975) 46

Gregory v. *Ashcroft*,
501 U.S. 452 (1991) 53

Gwaltney of Smithfield, Ltd. v. *Chesapeake Bay Found., Inc.*,
484 U.S. 49 (1987) 37

Hardin v. *Kentucky Utilities Coop.*,
390 U.S. 1 (1968) 15, 16, 37

TABLE OF AUTHORITIES—continued

Page(s)

Havens Realty Corp. v. *Coleman*,
455 U.S. 363 (1982) 40, 41, 42

Heckler v. *Mathews*,
465 U.S. 728 (1984) 37, 41

Jones v. *United States*,
529 U.S. 848 (2000) 53

Keech v. *Sandford*,
Sel. Cas. T. King 61, 25 Eng. Rep.
223 (Ch. 1726) 26

Kucana v. *Holder*,
558 U.S. 233 (2010) 54

Lewis v. *Casey*,
518 U.S. 343 (1996) 28

Lexmark Int'l, Inc. v. *Static Control Components, Inc.*,
134 S. Ct. 1377 (2014) 37

Lincoln v. *Hapgood*,
11 Mass. 350 (1814) 25

Linda R.S. v. *Richard D.*,
410 U.S. 614 (1973) 14, 15

Lujan v. *Defenders of Wildlife*,
504 U.S. 555 (1992) ..... *passim*

Marshall v. *Jerrico, Inc.*,
446 U.S. 238 (1980) 30

Marzetti v. *Williams*,
1 B. & Ad. 415, 109 Eng. Rep. 842
(K.B. 1830) 25, 26, 46

Massachusetts v. *EPA*,
549 U.S. 497 (2007) 15, 38

TABLE OF AUTHORITIES—continued

Page(s)

Mayor of London v. *Mayor of Lynn*,
VII Brown 120, 3 Eng. Rep. 78
(H.L. 1796) 24

Memphis Cmty. Sch. Dist. v. *Stachura*,
477 U.S. 299 (1986) 48

Middlesex County Sewerage Auth. v.
Nat'l Sea Clammers Ass'n,
453 U.S. 1 (1981) 37

Milkovich v. *Lorain Journal Co.*,
497 U.S. 1 (1990) 10, 50, 51, 52

Millar v. *Taylor*,
98 Eng. Rep. 201 (K.B. 1769) 49

Murray v. *GMAC Mortg. Corp.*,
434 F.3d 948 (7th Cir. 2006) 33

Nixon v. *Herndon*,
273 U.S. 536 (1927) 25

Pennhurst State Sch. & Hosp. v.
Halderman,
451 U.S. 1 (1981) 53

Planck v. *Anderson*,
5 T.R. 37, 101 Eng. Rep. 21
(K.B. 1792) 23

Pub. Citizen v. *Dep't of Justice*,
491 U.S. 440 (1989) 42, 43, 44

Raines v. *Byrd*,
521 U.S. 811 (1997) 11, 13, 27

Robert Marys's Case,
9 Co. Rep. 110b, 77 Eng. Rep. 895
(K.B. 1613) 23

TABLE OF AUTHORITIES—continued

Page(s)

Rude v. *Westcott*,
130 U.S. 152 (1889) 46

Schlesinger v. *Reservists Comm. to Stop the War*,
418 U.S. 208 (1974) 12

Shady Grove Orthopedic Assocs. v. *Allstate Ins. Co.*,
559 U.S. 393 (2010) 34

Simon v. *E. Ky. Welfare Rights Org.*,
426 U.S. 26 (1976) 11, 35

Sprint Commc'ns Co. v. *APCC Servs., Inc.*,
554 U.S. 269 (2008) 20

Steel Co. v. *Citizens for a Better Env't*,
523 U.S. 83 (1998) ..... *passim*

Stern v. *Marshall*,
131 S. Ct. 2594 (2011) 32

Summers v. *Earth Island Inst.*,
555 U.S. 488 (2009) ..... *passim*

Swift v. *Chamberlain*,
3 Conn. 537 (1821) 25

Trafficante v. *Metropolitan Life Ins. Co.*,
409 U.S. 205 (1972) 15, 16

Trans Union LLC v. *FTC*,
122 S. Ct. 2386 (2002) 34

United States v. *Alvarez*,
132 S. Ct. 2537 (2012) 52

TABLE OF AUTHORITIES—continued

Page(s)

Utah Animal Rights Coal. v. *Salt Lake City Corp.*, 371 F.3d 1248 (10th Cir. 2004) 45

Valley Forge Christian Coll. v. *Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982) 13, 31, 38

Vermont Agency of Natural Res. v. *United States ex rel. Stevens*, 529 U.S. 765 (2000) ..... *passim*

Wal-Mart Stores, Inc. v. *Dukes*, 131 S. Ct. 2541 (2011) 35

Warth v. *Seldin*, 422 U.S. 490 (1975) 14, 15, 35, 42

Washington ex rel. Seattle Title Trust Co. v. *Roberge*, 278 U.S. 116 (1928) 32

Webb v. *Portland Mfg. Co.*, 29 F. Cas. 506 (C.C.D. Me. 1838) 45, 46

Whittemore v. *Cutter*, 29 F. Cas. 1120 (C.C.D. Mass. 1813) 46

Woolton v. *Salter*, 3 Lev. 104, 83 Eng. Rep. 599 (C.P. 1683) 23

Work v. *U.S. ex rel. Rives*, 267 U.S. 175 (1925) 44

Wylie v. *Birch*, 4 Q.B. 565, 114 Eng. Rep. 1011 (Q.B. 1843) 24

TABLE OF AUTHORITIES—continued

Page(s)

CONSTITUTION, STATUTES, AND RULES

U.S. CONST. art. II, § 3 29
U.S. CONST. art. III, § 2 ..... *passim*
28 U.S.C. § 1254(1) 1
28 U.S.C. § 1292(b) 6
Clean Water Act
33 U.S.C. § 1365(g) 37
Fair Credit Reporting Act
15 U.S.C. § 1681 *et seq.* 1
15 U.S.C. § 1681b(b)(1) 3, 5, 40
15 U.S.C. § 1681e(b) 3
15 U.S.C. § 1681e(d) 3, 5
15 U.S.C. § 1681e(d)(1)-(2) 40
15 U.S.C. § 1681j(a) 3
15 U.S.C. § 1681j(a)(1)(c) 5, 40
15 U.S.C. § 1681n(a)(1) 3, 55
15 U.S.C. § 1681n(a)(2) 3, 55
15 U.S.C. § 1681o(a) 3, 55
15 U.S.C. § 1681s(a)(2) 34
12 C.F.R. § 1022.136 ..... 5, 40
Fair Housing Act
42 U.S.C. § 3604(d) 40
False Claims Act
31 U.S.C. § 3730(b)(1) 31
31 U.S.C. § 3730(c)(2)(A) 31

TABLE OF AUTHORITIES—continued

Page(s)

Freedom of Information Act
5 U.S.C. § 552 43
Fed. R. Civ. P. 23(b)(3) 32, 33

MISCELLANEOUS

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DAN B. DOBBS, LAW OF REMEDIES § 3.3(2) (2d ed. 1993) 45
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W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW (1903) 21
KENT, COMMENTARIES ON AMERICAN LAW (1827) 50, 51
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TABLE OF AUTHORITIES—continued

Page(s)

DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES: CASES AND MATERIALS (3d ed. 2002) 45

F.W. MAITLAND, THE FORMS OF ACTION AT COMMON LAW (1929) 21, 22

PROSSER ON TORTS, § 116A 48

RESTATEMENT (SECOND) OF TORTS § 402A (1965) 37

RESTATEMENT (SECOND) OF TORTS § 559 (1977) 50, 51

John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 Duke L.J. 1219 (1993) 17, 37, 44, 55

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 742 F.3d 409. The order of the district court granting petitioner's motion to dismiss the complaint (Pet. App. 11a-14a) is unreported but is available at 2011 WL 597867. The order of the district court granting in part and denying in part petitioner's motion to dismiss the first amended complaint (Pet. App. 15a-22a) is unreported but is available at 2011 WL 1793334. The order of the district court "correcting prior ruling and finding moot motion for certification" for interlocutory appeal, and dismissing the case (Pet. App. 23a-24a), is unreported but is available at 2011 WL 11562151.

JURISDICTION

The judgment of the court of appeals was entered on February 4, 2014. The petition for a writ of certiorari was filed on May 1, 2014, and was granted on April 27, 2015. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, Section 2 of the U.S. Constitution provides that "[t]he judicial Power shall extend to all Cases, in Law and Equity, arising under * * * the Laws of the United States * * *."

The pertinent provisions of the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.*, are set forth at App., *infra*, 1a-6a.

STATEMENT

The "doctrine of standing" is "an essential and unchanging part of the case-or-controversy require-

ment of Article III." *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The "irreducible constitutional minimum" for establishing standing is that a "plaintiff must have suffered an 'injury in fact,'" by sustaining an "actual or imminent" harm that is "concrete and particularized." *Ibid.* (quotation marks omitted).

Yet the court of appeals permitted respondent Thomas Robins to maintain a lawsuit in federal court based solely on an injury in law untethered to any concrete harm—in other words, without any real-world injury. Respondent alleges that petitioner Spokeo, Inc. violated the Fair Credit Reporting Act (FCRA) by publishing inaccurate information about him and by failing to provide third parties with various notices required by the statute. Relying on these bare statutory violations, respondent filed a putative class action, seeking the maximum statutory damages of $1,000 per violation on behalf of a putative class with millions of potential members.

Because respondent did not allege any concrete harm, the district court dismissed his claims for lack of standing. See Pet. App. 13a-14a. The Ninth Circuit reversed, however, holding that the allegation of a violation of the FCRA with respect to information about respondent by itself establishes injury in fact even when there is no concrete harm. See Pet. App. 8a.

If allowed to stand, that decision would eviscerate Article III's standing requirements by rendering the injury-in-fact requirement an empty formality. A dispute could engage the federal judicial power whenever a plaintiff alleged a violation of any technical requirement imposed under the FCRA or many other statutes. As we explain, however, Article III

does not extend standing to a plaintiff who has not suffered concrete harm.

A. The Fair Credit Reporting Act.

The FCRA imposes specific obligations on "consumer reporting agencies" with respect to the consumer information they transmit. As pertinent here, the FCRA limits the circumstances in which consumer reporting agencies may provide "consumer report[s] for employment purposes" (15 U.S.C. § 1681b(b)(1)) and requires such agencies to "follow reasonable procedures to assure maximum possible accuracy of" consumer reports (*id.* § 1681e(b)); to issue notices to providers and users of information (*id.* § 1681e(d)); and to post toll-free telephone numbers to allow consumers to request consumer reports (*id.* § 1681j(a)). See Pet. App. 4a-5a.

A negligent violation of these requirements "with respect to any consumer" subjects a consumer reporting agency to "actual damages," attorney's fees, and costs. 15 U.S.C. § 1681*o*(a). For "willful" violations such as those alleged here, however, a consumer may choose between "actual damages" and statutory "damages of not less than $100 and not more than $1,000," *id.* § 1681n(a)(1), and also may seek punitive damages. *Id.* § 1681n(a)(2).

B. Spokeo's Search Engine.

Petitioner Spokeo, Inc., operates a "people search engine." Spokeo's search engine aggregates publicly available information regarding individuals from phone books, social networks, marketing surveys, real estate listings, business websites, and other sources into a database that is searchable via the Internet using an individual's name, phone number, email, or physical address, and displays the results

of searches in an easy-to-read format. During the time relevant to this action, the bottom of every search results page stated:

> Spokeo does not verify or evaluate each piece of data, and makes no warranties or guarantees about any of the information offered. Spokeo does not possess or have access to secure or private financial information.

C.A. Supp. Excerpts of Record (ER) 22.

In particular, Spokeo warned its users that "none of the information offered by Spokeo is to be considered for purposes of determining any entity or person's eligibility for credit, insurance, employment, or for any other purposes covered under FCRA." C.A. Supp. ER 22. Additionally, to access the "Wealth" section of search results, users had to agree that "[n]one of the information offered by Spokeo is to be considered for purposes of determining a consumer's eligibility for credit, insurance, employment, or for any other purpose authorized under the FCRA." C.A. Supp. ER 25.

C. Respondent's Lawsuit.

Respondent Thomas Robins instituted a putative class action against Spokeo, alleging that Spokeo is a "consumer reporting agency" that issues "consumer reports" in violation of the FCRA.[1] See Pet. App. 19a-20a. Respondent alleged that the search results associated with his name included inaccurate information indicating that he has more education and professional experience than he actually does have;

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[1] Spokeo disputes Robins's claims that it is a "consumer reporting agency" within the meaning of the FCRA, and that its search engine results are "consumer reports."

that he is married (although in fact he is not); and that he is better situated financially than he really is. Pet. App. 2a; J.A. 14. Respondent did not allege that he had contacted Spokeo to ask it to correct or remove the search results pertaining to him.

In addition, respondent alleged several other theories of liability, contending that Spokeo: (1) failed to issue notices to providers and users of information pursuant to § 1681e(d); (2) failed to ensure that employers who sought consumer reports for purposes of making employment decisions complied with the FCRA's disclosure requirements under § 1681b(b)(1); and (3) violated § 1681j(a)(1)(c) and 12 C.F.R. § 1022.136 by failing to provide consumers with a toll-free number to request annual reports. Pet. App. 4a-5a; J.A. 18-23.

D. Proceedings In The District Court.

The district court dismissed respondent's initial complaint with leave to amend, holding that he had failed to allege an injury in fact because he had not alleged "any actual or imminent harm." See Pet. App. 2a. The court explained that respondent's allegations of possible future effects on "his ability to obtain credit, employment, insurance, and the like" do not satisfy Article III's standing requirements. *Ibid.* (quotation marks omitted).

Respondent's amended complaint alleged that the inaccurate information collected in Spokeo's search results had harmed his "employment prospects." Pet. App. 2a (quotation marks omitted). He also alleged that his continued unemployment had cost him money and that he had experienced "anxiety, stress, concern, and/or worry about his diminished employment prospects." *Ibid.* (quotation marks omitted). The district court initially held that the amend-

ed allegations amounted to injury in fact. Pet. App. 3a. After Spokeo sought certification of an interlocutory appeal under 28 U.S.C. § 1292(b), however, the district court reconsidered its views and dismissed the case with prejudice based on the Article III analysis in its original dismissal order. *Ibid.*

E. The Court of Appeals' Decision.

The Ninth Circuit reversed, holding that the "creation of a private cause of action to enforce a statutory provision implies that Congress intended the enforceable provision to create a statutory right," and that "the violation of a statutory right is usually a sufficient injury in fact to confer standing." Pet. App. 6a (citing *Edwards* v. *First American Corp.*, 610 F.3d 514, 517 (9th Cir. 2010), cert. granted, 131 S. Ct. 3022 (2011), cert. dismissed as improvidently granted, 132 S. Ct. 2536 (2012)).

In the court of appeals' view, "the statutory cause of action *does not require a showing of actual harm* when a plaintiff sues for willful violations." Pet. App. 6a (emphasis added). The court therefore concluded that actual harm is also unnecessary to establish constitutional injury in fact. Instead, the court held that respondent had "satisf[ied] the injury-in-fact requirement of Article III" because "he allege[d] that Spokeo violated *his* statutory rights, not just the statutory rights of other people," and because his "personal interests in the handling of his credit information are individualized rather than collective." Pet. App. 8a.

The court of appeals specifically refused to rest its ruling on the alleged harm to respondent's employment prospects and related anxiety: "[b]ecause we determine that Robins has standing by virtue of the alleged violations of his statutory rights, we do

not decide whether [those alleged harms] could be sufficient injuries in fact." Pet. App. 9a n.3. The court of appeals declined to construe the statutory damages provision as an alternate measure of damages rather than a substitute for injury in fact, perceiving no "difficult constitutional questions" to be avoided. Pet. App. 6a-7a n.2.

The Ninth Circuit recognized that its analysis had the practical effect of turning the three-part test for Article III standing into a single-factor inquiry that was satisfied by the availability of a statutory remedy. See Pet. App. 9a. As the court of appeals put it, "[w]hen the injury in fact is the violation of a statutory right * * * inferred from the existence of a private cause of action, causation and redressability will usually be satisfied." *Ibid.* In other words, causation is self-evident, because the statutory violation *is* the injury. *Ibid.* And the presence of a statutory remedy guarantees redressability, since there is no injury to redress apart from the statutory violation itself. *Ibid.*

SUMMARY OF THE ARGUMENT

Article III's restriction of the "judicial power of the United States" to "cases" and "controversies" requires a private plaintiff to demonstrate his or her standing to maintain an action in federal court. The most important element of the standing inquiry is the existence of an injury in fact that is "concrete," "actual," and "particularized." *Lujan*, 504 U.S. at 560. This Court has recognized a variety of types of harm that can constitute injury in fact, including pecuniary loss; lost business opportunities; loss of enjoyment of public resources; and discriminatory treatment based on race, sex or some other prohibited characteristic.

The Ninth Circuit held that respondent could satisfy the injury-in-fact requirement without alleging any of these concrete harms. It concluded that his allegation of a violation of "his statutory rights"—standing alone—sufficed to establish injury in fact. Pet. App. 8a. That determination is inconsistent with this Court's precedents and with the Constitution's text and history.

To begin with, this Court has consistently held that Congress may not override Article III's requirement of injury in fact. "[T]he requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute." *Summers* v. *Earth Island Inst.*, 555 U.S. 488, 497 (2009).

That "hard floor" necessitates allegations of concrete harm: the Constitution's text and history—and the common law tradition at the time of the Founding—show that concrete harm is essential to establish injury in fact. The "case" or "controversy" requirement limits the federal judicial power to matters that the Framers would have recognized as appropriate for resolution by courts—the types of disputes familiar to lawyers trained in the Anglo-American legal tradition. That tradition confined courts' authority to disputes involving concrete harms.

Separation-of-powers principles confirm that the federal judicial power is limited to resolving cases involving concrete harm. Requiring a plaintiff to demonstrate concrete harm ensures that courts do not stray beyond their limited sphere of authority, prevents Congress from impermissibly delegating to private plaintiffs the Executive's duty to enforce the law, and protects individual liberty against the unaccountable, arbitrary exercise of private discretion.

The requirement of concrete harm is particularly important in cases like this one, where use of the class-action device to aggregate millions of statutory damages claims allows private plaintiffs to encroach more significantly upon the prosecutorial role of the Executive Branch, and pose a greater threat of arbitrariness, heightening separation-of-powers concerns.

Respondent's allegations of violations of the FCRA do not satisfy Article III's concrete harm requirement for multiple reasons.

First, a legal violation without concrete harm (*i.e.*, an injury in law) does not satisfy the injury-in-fact requirement. The court of appeals' contrary conclusion cannot be squared with Article III itself, this Court's standing precedents, or the separation-of-powers principles on which they rest. Injury in fact requires real-world harm, not just a bare statutory violation.

Second, the availability of statutory damages cannot substitute for concrete harm. It has long been established that the "private interest" in the outcome of a suit created by a statutory bounty is "insufficient to give a plaintiff standing." *Vermont Agency of Natural Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 772 (2000). Nor is the requirement of concrete harm somehow vitiated by the ability of plaintiffs in certain circumstances to recover presumed damages. That is because presumed damages are limited to those who suffer concrete harm: their purpose is to ensure a recovery in situations in which there may be problems of quantification and proof, not to provide damages to uninjured plaintiffs.

Third, respondent cannot avoid the concrete harm requirement by analogizing his claims to a

common law defamation action. Most of respondent's claims do not require proof of a false statement, and therefore bear no relationship to defamation. Moreover, defamation at common law required proof of harm. The narrow circumstances in which injury is presumed—when the false information exposes the plaintiff "to hatred, contempt, or ridicule," *Milkovich* v. *Lorain Journal Co.*, 497 U.S. 1, 13 (1990)—are not presented here, where the claimed false statements asserted that respondent was married with children and overstated his financial resources and education.

Fourth, respondent's allegations of possible harm to his employment prospects—contentions that the court of appeals did not address—fall far short of the concrete harm required to establish a case or controversy. Respondent alleges only a "highly attenuated chain of possibilities" that depend upon the "decisions of independent actors"—the precise situation that his Court has held insufficient to demonstrate injury in fact. *Clapper* v. *Amnesty Int'l USA*, 133 S. Ct. 1138, 1148, 1150 (2013).

This Court accordingly should hold that respondent's allegations of bare violations of federal statutes, without any accompanying concrete harm, are insufficient to establish injury in fact and, consequently, respondent lacks Article III standing.

But even if the Court concludes that a naked allegation of a statutory violation might satisfy the injury-in-fact standard, it should hold that the FCRA does not open the federal courts to plaintiffs who are unable to demonstrate concrete harm, because Congress has not clearly stated its intent to do so. In a variety of contexts, this Court has required Congress to speak clearly before interpreting a statute to disrupt the constitutional balance.

That rationale applies here. Because Congress did not clearly state its intent to displace the long-established concrete harm requirement—it did not "identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit," *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring)—the FCRA should be interpreted to preserve that requirement, and permit recovery of statutory damages only if the plaintiff demonstrates concrete harm from the statutory violation.

ARGUMENT

I. THE CONSTITUTION'S INJURY-IN-FACT REQUIREMENT IS NOT SATISFIED BY AN INJURY IN LAW UNACCOMPANIED BY CONCRETE HARM.

Article III limits the federal "judicial Power" to the resolution of "Cases" or "Controversies." U.S. CONST. art. III, § 2. "'No principle is more fundamental to the judiciary's proper role in our system of government than th[is] constitutional limitation of federal-court jurisdiction to actual cases or controversies.'" *Raines* v. *Byrd*, 521 U.S. 811, 818 (1997) (quoting *Simon* v. *E. Ky. Welfare Rights Org.*, 426 U.S. 26, 37 (1976)).

Standing principles delineate "the 'Cases' and 'Controversies' that are of the justiciable sort referred to in Article III." *Lujan*, 504 U.S. at 560. To demonstrate standing, a plaintiff bears the burden of showing that he

> (1) * * * has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and

> (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Friends of the Earth, Inc. v. *Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 180-81 (2000). Injury in fact is the "indispensable element of a dispute which serves in part to cast it in a form traditionally capable of judicial resolution." *Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U.S. 208, 220-21 (1974).

The question in this case is whether respondent's assertion of statutory violations relating to information about him—unaccompanied by any concrete and particularized harm—constitutes injury in fact sufficient to satisfy Article III. This Court's precedents make clear that the answer to that question is "no."

First, Article III establishes a minimum injury requirement that Congress may not override. *Second*, that constitutional minimum requires actual or imminent concrete harm—a violation of law without harm does not suffice. The concrete harm requirement was applied by the English courts familiar to the Framers and is necessary to ensure the Judiciary's limited role in our system of separated powers, to prevent Congress from transferring to private parties authority that the Constitution reserves to the Executive Branch, and to protect the liberty that is the Constitution's fundamental guarantee.

Third, respondent cannot satisfy the concrete harm requirement. His allegation of legal violations without pecuniary or any other harm does not suffice. That the violations relate to information about him—as opposed to information about someone else—does not create the harm that Article III requires. Nor does Congress's authorization of a bounty

in the form of statutory damages substitute for concrete harm. Finally, the treatment of defamation actions at common law confirms that respondent's claim does not qualify as a case or controversy.

A. This Court Has Consistently Held That Congress May Not Vitiate Article III's Requirement Of Injury In Fact.

It is "settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing." *Raines*, 521 U.S. at 820 n.3 (citing *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 100 (1979)).

Of course, Congress may "expand standing to the full extent permitted by Art. III, thus permitting litigation by one 'who otherwise would be barred by *prudential* standing rules.'" *Gladstone*, 441 U.S. at 100 (emphasis added).

But "[i]n no event * * * may Congress abrogate the Art. III minima" requiring that the plaintiff has "suffered a distinct and palpable injury to himself that is likely to be redressed if the requested relief is granted." *Ibid.* (quotation marks and citation omitted); see also *Valley Forge Christian Coll.* v. *Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 487 n.24 (1982) ("Neither the Administrative Procedure Act, nor any other congressional enactment, can lower the threshold requirements of standing under Art. III.").

Indeed, the injury-in-fact requirement is the element of standing *most* insulated from congressional override. Congress arguably may "loosen the strictures of the redressability prong," for instance, by creating a statutory cause of action and providing for

a statutory remedy, but "the requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute." *Summers*, 555 U.S. at 497.

Some lower courts, including the court below (Pet. App. 5a-6a), have nonetheless held that Congress may override the Constitution's injury-in-fact requirement. They rely on this Court's statement that "[t]he actual or threatened injury required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing.'" *Warth* v. *Seldin*, 422 U.S. 490, 500 (1975) (quoting *Linda R.S.* v. *Richard D.*, 410 U.S. 614, 617 n.3 (1973)). That interpretation of *Warth* is wrong for three reasons.

First, the Court in *Warth* itself explained that while "Congress may grant an express right of action to persons who otherwise would be barred by *prudential* standing rules," "Art. III's requirement remains: the plaintiff still must allege a *distinct and palpable injury* to himself." *Id.* at 501-02 (emphases added). And the Court concluded that none of the plaintiffs in *Warth* had standing, because none had "allege[d] specific, concrete facts demonstrating that the challenged practices harm[ed] him," *id.* at 508—making clear that the constitutional requirement remained in full force.

Second, the Court has explained that *Warth* and *Linda R.S.* stand only for the proposition that Congress may "elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law." *Lujan*, 504 U.S. at 578. If the plaintiff has suffered concrete harm sufficient to qualify as an "injury in fact" under Article III—but there is no remedy at law for that injury—Congress

may create a remedy. See *ibid.*; see also *Vermont Agency*, 529 U.S. at 773 (citing *Warth* for the proposition that "Congress can[] define new legal rights, which in turn will confer standing to vindicate *an injury* caused to the claimant") (emphasis added); RICHARD H. FALLON, JR. ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 144 (6th ed. 2009).

It is only in this way that "'Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before.'" *Massachusetts* v. *EPA*, 549 U.S. 497, 516 (2007) (quoting *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring)); see also *id.* at 517 (emphasizing that "'the party bringing suit must show that the action injures him in a concrete and personal way'") (quoting *Lujan*, 504 U.S. at 581 (Kennedy, J., concurring)).

Third, the Court in *Lujan* explained that the elevation of a concrete injury in fact into a cognizable legal claim is the situation that the Court addressed in *Trafficante* v. *Metropolitan Life Insurance Co.*, 409 U.S. 205 (1972), and *Hardin* v. *Kentucky Utilities Co-op.*, 390 U.S. 1 (1968)—the two cases on which *Linda R.S.* (and thus *Warth* as well) relied. See *Lujan*, 504 U.S. at 578.

Trafficante involved the standing of the white tenants of an apartment complex to assert claims under the Civil Rights Act of 1968 challenging the racially-discriminatory practices of their landlord. The Court held that the tenants had alleged "injury in fact" in "the loss of important benefits from interracial associations" caused by the landlord's "exclusion of minority persons from the apartment complex." *Trafficante*, 409 U.S. at 209-10.

In particular, the tenants alleged that they "had suffered embarrassment and economic damage in social, business, and professional activities from being 'stigmatized' as residents of a 'white ghetto,'" missing "business and professional advantages which would have accrued if they had lived with members of minority groups." *Id.* at 208. That concrete harm was elevated to a legally cognizable cause of action by the Civil Rights Act of 1968.

Hardin is an even clearer example of an injury in fact rendered legally cognizable by statute. The *Hardin* Court held that a private utility company had standing to seek to enjoin the Tennessee Valley Authority (TVA) from supplying cheap power to a new municipal power system that competed with the private utility. The private company suffered palpable economic harm—the loss of customers to the cheaper municipal competitor. Ordinarily, "economic injury which results from lawful competition [could not], in and of itself, confer standing on the injured business to question the legality of any aspect of its competitor's operations"—because very few laws create a private cause of action for damages suffered from mere competition. *Hardin*, 390 U.S. at 5-6. But Congress—by enacting a statute restraining the operations of the TVA in order to protect private competitors—had created a new legal claim to vindicate that already-existing economic injury. *Id.* at 6-7.

In sum, this Court's precedents make clear that Congress may create new causes of action that elevate concrete harm into a cognizable legal claim, but it may not create injury in fact by fiat. *Summers*, 555 U.S. at 497; *Lujan*, 504 U.S. at 578. "[The Court's] prior cases * * * were consistent with the injury in fact requirement, because in those cases the statutes in question elevated injuries that were not previously

legally cognizable to the status of legally enforceable rights." John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 Duke L.J. 1219, 1228 (1993).

The Court's recognition "that Article III is a constraint on Congress's power to assign matters to the federal courts" is hardly surprising, "because the legislature is not supreme in our system of government—the Constitution is." *Id.* at 1229.

B. The Constitution's Text And History—And The Controlling Common Law Background—Establish That Concrete Harm Is Essential For A Dispute To Qualify As A "Case" Or "Controversy."

The terms "case" and "controversy" derive their meaning from "the Constitution's central mechanism of separation of powers" and the "common understanding of what activities are appropriate to legislatures, to executives, and to courts." *Lujan*, 504 U.S. at 559-60; accord *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 102 (1998). That "common understanding" requires proof of concrete harm, not just violation of a legal requirement, because both were recognized as necessary to render a dispute a proper "case" or "controversy" for judicial resolution at the time the Constitution was adopted—and the Framers incorporated that standard into Article III. Moreover, any other rule would extend judicial authority beyond its proper sphere, enable Congress to encroach upon the Executive Branch's law enforcement prerogatives, and threaten the liberty that the separation of powers protects.

1. *Article III, Section 2 Limits The Federal Judicial Power To Disputes The Framers Would Have Recognized As Appropriate For Resolution By Courts.*

The Constitution's "cases" and "controversies" requirement ensures that the "[j]udicial power could come into play only in matters that were the traditional concern of the courts at Westminster and only if they arose in ways that to the expert feel of lawyers constituted 'Cases' or 'Controversies.'" *Coleman* v. *Miller*, 307 U.S. 433, 460 (1939) (opinion of Frankfurter, J.); see also *Vermont Agency*, 529 U.S. at 774 (quoting Justice Frankfurter's explanation in *Coleman*); *Steel Co.*, 523 U.S. at 102 (the provision limits federal courts to "cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process").

The drafting history of Article III, Section 2 confirms that limitation on the judicial power.

Initial versions of the constitutional provision would have authorized the federal courts to adjudicate a broad range of disputes. The Virginia Plan did not impose any textual limit restricting the federal courts to suits of a judicial nature. Rather, it extended inferior court jurisdiction to "questions which may involve the national peace and harmony." 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 22 (Max Farrand ed., 1966) ("FARRAND'S RECORDS") (reporting resolutions proposed by Edmund Randolph). The Committee of Detail subsequently expanded this provision, resolving that the lower courts should have jurisdiction over "Cases arising under the Laws passed by the general Legislature, and to such other Questions as involve the national Peace and Harmony." 2 FARRAND'S RECORDS at 132-33.

That very broad conception of judicial power reflected the view of the advocates for a strong national government, who pressed for a federal judiciary with expansive authority to enforce federal law. Alexander Hamilton, for example, would have created a federal judiciary that was not explicitly limited by contemporaneous understandings of the type of cases eligible for judicial resolution, but could "determin[e] * * * all matters of general concern." 1 FARRAND'S RECORDS 292.[2]

Champions of a more limited government, by contrast, argued against a federal judiciary that would displace state courts. See, *e.g.*, *id.* at 242-45 (describing William Paterson's "New Jersey Plan" which would provide only for federal appellate review of state court adjudication of questions arising under federal law).

Article III, Section 2 emerged as a compromise between these two views. It conferred authority sufficient to permit enforcement of federal laws, but limited the types of disputes that federal courts could resolve.

Thus, the Committee of Detail reported a first draft of the Constitution that removed the broad grant of authority to decide "other Questions as involve the national Peace and Harmony." Compare 2 FARRAND'S RECORDS at 133, with *id.* at 186. That language seemingly would have extended the judicial power to issuance of advisory opinions, resolving disputes in the absence of injury in fact, or otherwise

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[2] See also 3 FARRAND'S RECORDS 616 (describing Roger Sherman's proposal that the legislative branch have broad authority to establish lower courts and to "ascertain their respective powers and jurisdictions").

addressing matters not traditionally subject to judicial resolution.

The Committee of the Whole further narrowed this provision by substituting "judicial Power" for "jurisdiction," thereby incorporating the contemporaneous understanding of the scope of judicial authority. *Id.* at 425. See also *id.* at 430 (discussing debate over Madison's proposal to explicitly limit the cases subject to the "judicial power" to those of a "Judiciary Nature," and describing the rejection of that amendment as unnecessary, "it being generally supposed that the jurisdiction was constructively limited to cases of a Judiciary nature").

This drafting history confirms that the federal "judicial Power" is confined to those matters familiar to the Framers as disputes appropriate for resolution in court. The English legal tradition, to which we now turn, is the source of that contemporaneous understanding. See *Sprint Commc'ns Co.* v. *APCC Servs., Inc.*, 554 U.S. 269, 274 (2008) ("We have often said that history and tradition offer a meaningful guide to the types of cases that Article III empowers federal courts to consider."); *Coleman*, 307 U.S. at 460 (opinion of Frankfurter, J.) (in crafting Article III, "the framers * * * gave merely the outlines of what were to them the familiar operations of the English judicial system and its manifestations on this side of the ocean before the Union"). It confirms that concrete harm is a necessary precondition for a judicial "case" or "controversy."

2. The English Legal Tradition Confined The Courts' Authority To Disputes Involving Concrete Harms.

In the English legal tradition familiar to the Framers, a concrete harm was a necessary element

of any judicial dispute—the violation of a legal right by itself did not suffice.

The English legal system began with the King's resolution of disputes that threatened the peace. F.W. MAITLAND, THE FORMS OF ACTION AT COMMON LAW 314 (1929) (describing limited role of royal justice in period from 1066-1154); 1 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 23-26 (1903) (describing emergence of royal courts). The parties were "landowners, many of whom were warriors by trade"; the "claims" involved disputes over ownership of property and similarly grave matters that otherwise would have been resolved by force of arms. JOHN LANGBEIN ET AL., THE HISTORY OF THE COMMON LAW 86 (2009). Indeed, the principal purpose of the early royal civil justice system was to provide an alternative to "the resolution of disputes [by] private warfare." *Ibid.*

The writ of trespass—the root of much of modern law—has similar origins as a mechanism for resolving violent disputes that inflicted serious harm. It emerged from the criminal context, providing a remedy when the "defendant is charged [by the plaintiff] with a breach of the king's peace, though with one that does not amount to felony." MAITLAND at 343-44. The writ permitted lawsuits if, "with force and arms the defendant has assaulted and beaten the plaintiff, broken the plaintiff's close, or carried off the plaintiff's goods, he is sued for damages." *Id.* at 343. The requirement that a plaintiff allege "trespass *vi et armis*" ("trespass with force and arms") became largely fictional, but the writ remained grounded in physical invasion sufficient to "breach the king's peace." *Id.* at 344.

Ultimately, the early English legal system generated a limited set of writs to remedy a defined set of

harms. While it became a truism that every legal wrong had a remedy, see 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *23 (1st ed. 1768), that was because legal wrongs—the category of wrongs justifying the exercise of judicial authority—were in each case defined to require a showing of concrete harm. Maitland thus explained that a plaintiff "may find that, plausible as his case may seem, it just will not fit any of the receptacles provided by the courts and he may take to himself the lesson that where there is no remedy there is no wrong." MAITLAND at 298-99.

Blackstone enumerated the "several injuries cognizable by the courts of common law, with * * * respective remedies applicable to each particular injury." 3 BLACKSTONE, COMMENTARIES *115. Each legal wrong that Blackstone identified involved the infliction of concrete harm on a person or property, making clear that such harm was a prerequisite for asserting a claim in court. These wrongs included, for example, harms "affecting the limbs or bodies of individuals" (*id.* at *120); "threats and menaces of bodily hurt" (*ibid.*); "selling him bad provisions or wine" (*id.* at *122); "exercise of a noisome trade, which infects the air in his neighborhood" (*ibid.*); "neglect or unskillful management of his physician, surgeon, or apothecary" (*ibid.*); "injuries, affecting a man's reputation or good name"—*i.e.*, slander and defamation (*id.* at *123); "preferring malicious indictments or prosecutions against him" (*id.* at *126); "false imprisonment" (*id.* at *127); "injuries that may be offered to a person, considered as a husband" (*id.* at *139), "parent" (*id.* at *140), or "guardian" (*id.* at *141) (*i.e.*, injuries to one's spouse, child, or ward); interfering with performance of a servant's duties (*id.* at *141); injuries to personal property (*id.* at

*145); contract-related wrongs, mainly, breaches of contract (*id.* at *153-66); and "real injuries * * * or injuries affecting real rights" (*id.* at *167)—*i.e.*, injuries to real property (*id.* at *167-253).

English cases confirm that a showing of harm was required for courts to entertain a claim.

For example, Sir Edward Coke reported in *Robert Marys's Case*, 9 Co. Rep. 110b, 113a note (D), 77 Eng. Rep. 895, 898 (K.B. 1613), that *injuria* (legal injury) and *damnum* (damage) must be present in an action on the case regarding overgrazing of the common. See also *Atkinson* v. *Teasdale*, 3 Wils. K.B. 282, 288, 95 Eng. Rep. 1054, 1059 (C.P 1772) (de Grey, C.J.) (explaining that a plaintiff "must be damaged to intitle him" to bring an action for trespass on the case); *Woolton* v. *Salter*, 3 Lev. 104, 104, 83 Eng. Rep. 599, 599 (C.P. 1683) (same).

Justice Dodderidge likewise stated in *Cable* v. *Rogers*, 3 Bulst. 312, 312, 81 Eng. Rep. 259, 259 (K.B. 1625) that "*injuria absque damno*" ("injury without damage") was not actionable, and a 1611 decision of the Court of Common Pleas explained that a commoner could bring an action against a stranger who inflicted "a damage whereby [the commoner] los[t] [his] common," but "no action lieth" when no harm is suffered by a putative plaintiff—and therefore a master could not maintain suit against a third party for the third-party's assault on his servant if the master did not "lose his service." *Crogate* v. *Morris*, 1 Brown. & Golds. 197, 197, 123 Eng. Rep. 751, 751 (C.P. 1611). See also *Planck* v. *Anderson*, 5 T.R. 37, 40-41, 101 Eng. Rep. 21, 23 (K.B. 1792) (barring action where plaintiff was not prejudiced by sheriff's failure to maintain custody over a defendant because the defendant/prisoner was available at the time he

was required); *Wylie* v. *Birch*, 4 Q.B. 565, 577, 114 Eng. Rep. 1011, 1015 (Q.B. 1843) (no action for breach of a sheriff's duty to levy goods unless the breach causes damage to the plaintiff).

English courts also allowed suits to proceed on the basis of imminent concrete harm. Thus, in *Mayor of London* v. *Mayor of Lynn*, VII Brown 120, 125, 3 Eng. Rep. 78, 82 (H.L. 1796), the House of Lords permitted a suit over the right of Londoners to be toll-free to proceed, "not for an actual damage, nor for an actual injury, but merely for damage and injury feared" from the obligation to pay a toll.

The required concrete harm was not limited to pecuniary losses. In the well-known case of *Ashby* v. *White* for example, the House of Lords reversed a decision of the Queen's Bench regarding an election law dispute. Grounding its decision in the prohibition against suits alleging "*injuria sine damno*" ("injury without damage"), the Queen's Bench had concluded that an elector was not prejudiced by refusal to allow him to vote. *Ashby* v. *White*, 6 Mod. 45, 46, 87 Eng. Rep. 808, 810 (Q.B. 1703). The House of Lords reversed on the ground that a refusal to permit a remedy in this circumstance was "destructive of the Property" of the plaintiff. *Ashby* v. *White*, 17 J. House L. 526, 534 (1704). See *Ashby* v. *White*, 1 Brown 62, 64, 1 Eng. Rep. 417, 418 (H.L. 1704).

Chief Justice Holt's dissent in the Queen's Bench provides the most complete legal analysis supporting the ultimate decision.[3] Chief Justice Holt made clear that not all damage is pecuniary, and that it is no

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[3] The 1704 report of the House of Lords consisted of four short paragraphs reflecting what the House "resolved," along with a "State of the Case." See 17 J. House L. at 534.

"little thing" to obstruct the "privilege of giving a vote in the election of a person in whose power my life, estate, and liberty lie." *Ashby*, 87 Eng. Rep. at 815-16 (Holt, C.J., dissenting).[4]

Thus, while the opinion is famous for its language justifying the judicial vindication of violations of legal rights, *Ashby*, 87 Eng. Rep. at 816 (Holt, C.J., dissenting), the action was nonetheless grounded in a cognizable concrete harm—the denial of the right to vote, which was viewed as a property right. As Justice Frankfurter made clear, "'Private damage' is the clue to the famous ruling in *Ashby v. White*, [citing Chief Justice Holt's dissent], and determines its scope as well as that of cases in this Court of which it is the justification." *Coleman*, 307 U.S. at 469 (opinion of Frankfurter, J.); see also *Nixon* v. *Herndon*, 273 U.S. 536, 540 (1927) (Holmes, J.) ("That private damage may be caused by such political action and may be recovered for in suit at law hardly has been doubted for over two hundred years, since *Ashby v. White*, * * * ").

Ashby v. *White*, moreover, emphasized the importance of vindicating rights that otherwise could be deemed waived. See *Ashby* v. *White*, 2 Ld. Raym. 938, 953-54, 92 Eng. Rep. 126, 136 (Q.B. 1703) (Holt, C.J., dissenting) (arguing that a right not vindicated is a right lost). Courts applied this rationale to property rights, see, *e.g.*, *Marzetti* v. *Williams*, 1 B. & Ad. 415, 426, 109 Eng. Rep. 842, 846 (K.B. 1830) (Taunton, J.) ("Trespass, quare clausum fregit [*i.e.*, by intruding on one's "close," or private land], is maintainable for an

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[4] American courts likewise concluded soon after the Founding that the loss of voting rights could form the basis of a private action. See, *e.g.*, *Swift* v. *Chamberlain*, 3 Conn. 537, 543 (1821); *Lincoln* v. *Hapgood*, 11 Mass. 350, 357 (1814).

entry on the land of another, though there be no real damage, because repeated acts of going over the land might be used as evidence of a title to do so, and thereby the right of the plaintiff may be injured."), and water rights, see, *e.g.*, *Bower* v. *Hill*, 1 Bing. N.C. 549, 555, 131 Eng. Rep. 1229, 1231 (C.P. 1835) (expressing concern about loss of rights by acquiescence in a water rights dispute). In each instance, the threat of a palpable concrete harm from an inability to seek judicial relief—loss of access to water, loss of control over property—supported the action based on a legal right.

Similarly, courts permitted actions based on loss of a bargain or breach of trust. In *Marzetti*, 109 Eng. Rep. at 846, for example, the court permitted a suit based on a breach of contractual rights, and in *Keech* v. *Sandford*, Sel. Cas. T. King 61, 62, 25 Eng. Rep. 223, 223-24 (Ch. 1726), the court permitted recovery of profits achieved through self-dealing by a trustee. Although neither plaintiff suffered economic loss, both actions were underpinned by the loss of the value of the special relationship established by contract or by trust. Concrete actual harm—the loss of a bargained-for or trust obligation—underpinned these suits for violation of long-recognized common law rights.

In sum, the legal tradition familiar to the Framers limited the exercise of judicial authority to disputes in which the claimant could prove actual or imminent concrete harm.

3. Separation-Of-Powers Principles Limit The Judicial Power To Cases Involving Concrete Harm.

In addition to the English legal tradition, fundamental separation-of-powers principles compel the

conclusion that concrete harm is essential to establish a "case" or "controversy." As this Court has observed, "the case-or-controversy limitation is crucial in maintaining the tripartite allocation of power set forth in the Constitution." *DaimlerChrysler Corp.* v. *Cuno*, 547 U.S. 332, 341 (2006) (quotation marks omitted).

Requiring a private plaintiff to demonstrate concrete harm is necessary to prevent the erosion of the Constitution's fundamental structure. *First*, it ensures that courts remain within their constitutionally limited role of redressing or preventing actual or imminently threatened injury. *Second*, it prevents Congress from impermissibly delegating to private plaintiffs the executive's duty to enforce the law. *Third*, it protects individual liberty against the arbitrary exercise of self-interested, unaccountable prosecutorial authority.

a. The Concrete Harm Requirement Ensures That The Judiciary Does Not Exceed Its Limited Role.

Article III's injury-in-fact requirement furthers the "overriding and time-honored concern about keeping the Judiciary's power within its proper constitutional sphere," *Raines*, 521 U.S. at 820, "defin[ing] with respect to the Judicial Branch the idea of separation of powers on which the Federal Government is founded." *Allen* v. *Wright*, 468 U.S. 737, 750 (1984). "In limiting the judicial power to 'Cases' and 'Controversies,' Article III of the Constitution restricts it to the traditional role of Anglo-American courts, which is to redress or prevent actual or imminently threatened injury to persons caused by private or official violation of law." *Summers*, 555 U.S. at 492.

"Whether the courts were to act on their own, or at the invitation of Congress, in ignoring the concrete injury requirement described in [the Court's] cases, they would be discarding a principle fundamental to the separate and distinct constitutional role of the Third Branch—one of the essential elements that identifies those 'Cases' and 'Controversies' that are the business of the courts rather than of the political branches." *Lujan*, 504 U.S. at 576.

Indeed, "the distinction between the two roles"—"the role of courts [and] that of the political branches"—"would be obliterated if, to invoke intervention of the courts, no actual or imminent harm were needed." *Lewis* v. *Casey*, 518 U.S. 343, 349-50 (1996); see also *Lujan*, 504 U.S. at 581 (Kennedy, J., concurring) ("[T]he requirement of concrete injury confines the Judicial Branch to its proper, limited role in the constitutional framework of Government.").

b. Requiring Private Plaintiffs To Demonstrate Concrete Injury Prevents Congress From Delegating Executive Power To Private Parties.

The Court has recognized that the Constitution's limitations on the judicial power help prevent the other branches from exceeding their constitutional roles. For example, the injury-in-fact requirement prevents the courts from "becom[ing] virtually continuing monitors of the wisdom and soundness of Executive action." *Lujan*, 504 U.S. at 577 (quotation marks omitted).

An equally significant separation-of-powers concern would arise if Congress could authorize private individuals to invoke the judicial power even though they have not suffered concrete harm.

The Take Care Clause of Article II confers upon the President the responsibility to "take Care that the Laws be faithfully executed." U.S. CONST. art. II, § 3. By authorizing private parties to seek out and sue over violations of the law that have caused them no harm, Congress would effectively "transfer from the President to [private citizens] the Chief Executive's most important constitutional duty, to 'take Care that the Laws be faithfully executed.'" *Lujan*, 504 U.S. at 577. That would erode individual liberty through the arbitrary exercise of unaccountable enforcement power.

Opening the door to collection of statutory damages—essentially fines—by uninjured parties presents the same "[d]ifficult and fundamental questions [that] are raised when we ask whether exactions of public fines by private litigants, and the delegation of Executive power which might be inferable from the authorization, are permissible in view of the responsibilities committed to the Executive by Article II of the Constitution of the United States." *Laidlaw*, 528 U.S. at 197 (Kennedy, J., concurring); see also Heather Elliott, *Congress's Inability To Solve Standing Problems*, 91 B.U. L. Rev. 159, 203 (2011) (noting the "significant" "Article II problem" that "suits against private individuals" brought by private plaintiffs "raise * * * about private interference with the exercise of prosecutorial discretion, and hence with the President's 'Take Care' power") (quotation marks omitted); see also generally Tara Leigh Grove, *Standing As An Article II Nondelegation Doctrine*, 11 U. Pa. J. Const. L. 781 (2009).

When a plaintiff is required to demonstrate actual, concrete harm, he may sue only the entity that caused him harm and only to redress the harm that he has suffered. Without a requirement of concrete

harm, however, there is nothing to stop private plaintiffs from seeking out and bringing lawsuits over bare statutory violations in the hope of obtaining a statutory bounty—even though such unharmed plaintiffs are asserting little more than a general interest in seeing "that the Nation's laws are faithfully enforced," which does not suffice to establish standing. *Steel Co.*, 523 U.S. at 107.

It matters a great deal—on a practical as well as a constitutional level—whether public prosecutors, as opposed to self-interested private parties, may enforce the laws in the absence of concrete harm. The Executive Branch's duty under the Take Care Clause includes the attendant discretion to decide which cases warrant prosecution—a choice for which the executive is politically accountable, see Grove, *supra*, 11 U. Pa. J. Const. L. at 797-802.

In addition, as this Court has long recognized, a government attorney "is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all," and the government attorney is therefore required to use the power of the sovereign to promote justice for all citizens. *Berger* v. *United States*, 295 U.S. 78, 88 (1935). Any "scheme injecting a personal interest, financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision." *Marshall* v. *Jerrico, Inc.*, 446 U.S. 238, 249 (1980). Private plaintiffs hunting for a bounty—and their lawyers—lack the political and legal constraints that cabin the executive's discretion,

and naturally respond to their own incentives, not the public interest.[5]

c. Maintaining Judicial And Executive Powers In Their Proper Spheres Is Essential To Protect Individual Liberty.

Because the exercise of judicial power "can so profoundly affect the lives, liberty, and property of those to whom it extends," it is "'legitimate only in the last resort, and as a necessity in the determination of real, earnest, and vital controversy.'" *Valley Forge*, 454 U.S. at 471, 473 (quoting *Chicago & Grand Trunk Ry.* v. *Wellman*, 143 U.S. 339, 345 (1892)).

Permitting private parties to sue over a mere statutory violation that works no concrete harm—in other words, to delegate the executive's duty to see that federal law is obeyed—would turn the judicial power from the "last resort" into the first resort of enterprising would-be plaintiffs. Such a delegation impermissibly subjects private parties to those plaintiffs' unbounded discretion, described above.

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[5] The False Claims Act, the federal *qui tam* statute, does not raise the same concerns of unchecked private enforcement. To begin with, the United States must itself have suffered a concrete harm, and the partial assignment of the claim arising from that harm is the basis for the relator's standing. See *Vermont Agency*, 529 U.S. at 773-74. In addition, the Executive Branch maintains significant control over *qui tam* litigation brought by private relators. For example, "[t]he Government may dismiss [a *qui tam*] action notwithstanding the objections of the person initiating the action." 31 U.S.C. § 3730(c)(2)(A). And a private plaintiff may not settle or dismiss a *qui tam* action without the government's consent. *Id.* § 3730(b)(1).

This Court has repeatedly recognized that the "'structural principles secured by the separation of powers protect'" not only "'the dynamic between and among the branches,'" but "'the individual as well.'" *Stern* v. *Marshall*, 131 S. Ct. 2594, 2609 (2011) (quoting *Bond* v. *United States*, 131 S. Ct. 2355, 2365 (2011)); see also *Bowsher* v. *Synar*, 478 U.S. 714, 721 (1986). "Liberty is always at stake when one or more of the branches seek to transgress the separation of powers." *Clinton* v. *City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring).

Thus, in other contexts this Court has disapproved statutes that leave individual liberty and property interests unprotected "from arbitrary encroachment * * * upon the application of and for the benefit of a private party," *Fuentes* v. *Shevin*, 407 U.S. 67, 80-81, 93 (1972), who may act "for selfish reasons or arbitrarily." *Washington ex rel. Seattle Title Trust Co.* v. *Roberge*, 278 U.S. 116, 118, 122-23 (1928); see also Grove, *supra*, 11 U. Pa. J. Const. L. at 824-26.

d. The Class-Action Device Heightens Separation-Of-Powers Concerns.

The class action device amplifies the separation-of-powers concerns—in particular, the threats to individual liberty—that arise when private parties may exercise government enforcement authority. As this Court has cautioned, "[i]n an era of frequent litigation [and] class actions, * * * courts must be more careful to insist on the formal rules of standing, not less so." *Arizona Christian Sch. Tuition Org.* v. *Winn*, 131 S. Ct. 1436, 1449 (2011).

The inevitable practical effect of permitting suits by individuals who have not suffered concrete harm is to relax Rule 23's "stringent requirements for

[class] certification." *American Express Co.* v. *Italian Colors Rest.*, 133 S. Ct. 2304, 2310 (2013). Once concrete harm is no longer an element of the plaintiff's case, the named plaintiff will argue that issues of injury and causation have been transformed from individualized matters to issues susceptible to common proof because, under an "injury-in-law" regime, the actual impact of the alleged legal violation is no longer relevant.

Eliminating individualized issues could ease a plaintiff's path to class certification, permitting a very large class—typically nationwide when the claim is asserted under federal law—with a huge damages claim. That is particularly true when, as under the FCRA, the law provides for statutory damages.

Thus, two courts of appeals have rejected challenges to class certification in FCRA actions, declaring class adjudication "superior" (Fed. R. Civ. P. 23(b)(3)) even when that device threatens to impose billions of dollars in damages for technical violations. See *Bateman* v. *American Multi-Cinema, Inc.*, 623 F.3d 708, 710-12 (9th Cir. 2010); *Murray* v. *GMAC Mortg. Corp.*, 434 F.3d 948, 952-53 (7th Cir. 2006). Indeed, cases seeking hundreds of millions or billions of dollars in damages based upon this standing theory are not unusual. See Experian Pet. Am. Br. 5-10 (collecting other examples of no-harm class actions under several statutes, including the FCRA); eBay Pet. Am. Br. 6-9 (same); Chamber Pet. Am. Br. 13-20 (same).

If a class were certified in this case, the potential exposure would reach into the billions of dollars: The Amended Complaint alleges that there are "millions" of class members (J.A. 15) on whose behalf respond-

ent seeks to recover "the maximum" statutory damages "allowable" (*id.* at 25) under the FCRA—$1,000 per violation.

These nationwide "no-harm" class actions are practically indistinguishable from government enforcement actions. Like government actions, they do not require proof that any individual suffered concrete harm; like government actions they seek relief on a nationwide basis; and like government actions the measure of recovery is unrelated to compensating individuals for economic or other harm. See 15 U.S.C. § 1681s(a)(2).

Moreover, the creation of class actions seeking gigantic claims poses a serious threat to liberty and due process. Few defendants continue to litigate cases after classes are certified; at that point, the pressure on defendants to settle is often overwhelming, even if the plaintiffs' allegations lack merit. See, *e.g.*, *AT&T Mobility LLC* v. *Concepcion*, 131 S. Ct. 1740, 1752 (2011) (explaining the "risk of 'in terrorem' settlements that class actions entail"). In particular, "[w]hen representative plaintiffs seek statutory damages"—as respondent does here—"pressure to settle may be heightened because a class action poses the risk of massive liability unmoored to actual injury." *Shady Grove Orthopedic Assocs.* v. *Allstate Ins. Co.*, 559 U.S. 393, 445 n.3 (2010) (Ginsburg, J., dissenting); see also *Trans Union LLC* v. *FTC*, 122 S. Ct. 2386, 2387 (2002) (Kennedy, J., dissenting from denial of certiorari) (noting that "[b]ecause the FCRA provides for statutory damages of between $100 and $1,000 for each willful violation, petitioner faces potential liability approaching $190 billion," an amount that is "crushing").

To be sure, high stakes and class actions often go hand in hand. But that fact only highlights the importance of strict adherence to the requirements of Article III standing. See *Arizona Christian*, 131 S. Ct. at 1449. Insisting on the constitutional minimum of concrete, palpable injury in fact—as opposed to the mere assertion of a statutory violation—ensures that the class action device remains the "exception to the usual rule" that cases are litigated individually. *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541, 2550 (2011) (quoting *Califano* v. *Yamasaki*, 442 U.S. 682, 700-01 (1979)). It reserves the class action device for those circumstances in which a defendant's alleged wrongdoing has caused concrete harm to each of the members of a class—as opposed to permitting allegations of bare statutory violations causing infinitesimal harm or no harm at all to be used as cudgels in extracting massive windfall settlements.[6]

* * * *

In sum, the text and history of the Constitution and the Anglo-American tradition incorporated by the Framers, as well as fundamental separation-of-powers principles, all demonstrate that a private plaintiff has not been injured in fact—and therefore lacks standing to sue—unless he or she can allege an actual or imminent concrete harm.

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[6] Contrary to respondent's suggestion, see Opp. 17, these concerns are not rendered irrelevant by this Court's comment that whether "a suit may be a class action * * * adds nothing to the question of standing." *Simon*, 426 U.S. at 40 n.20. That comment was offered in *defense* of strict adherence to the injury-in-fact requirement—in particular, to explain why named plaintiffs who seek to represent a class still "'must allege and show that they *personally* have been *injured*.'" *Ibid.* (emphases added) (quoting *Warth*, 422 U.S. at 502).

C. The FCRA Violations That Respondent Alleges Do Not Satisfy Article III's Concrete Harm Standard.

The court of appeals, the government, and respondent have advanced four different theories in contending that the claims here satisfy the injury-in-fact requirement. They contend that a legal violation by itself is sufficient; that statutory damages provide the necessary financial interest; that respondent's claims are analogous to a common law defamation action; and that the allegations are sufficient to satisfy the traditional concrete harm standard. Each argument falls short of demonstrating the concrete harm that the Constitution requires.

1. A Legal Violation Without Concrete Harm Cannot Satisfy The Injury-In-Fact Standard.

The principal theory advanced by the court below is that allegations of statutory violations are by themselves always sufficient to plead an injury in fact. That view cannot be squared with the Article III requirement of concrete harm, rooted in the common law and separation of powers, that we have just described. Nor can it be squared with this Court's standing precedents—which make clear that "the Article III requirement of remediable injury in fact * * * has nothing to do with the text of the statute relied upon." *Steel Co.*, 523 U.S. at 97 n.2.

a. A Legal Violation Cannot Substitute For Concrete Harm.

In many contexts, proof of actual or imminent concrete harm is an element of the legal violation. That is true of most torts. See, *e.g.*, 1 DAN B. DOBBS ET AL., THE LAW OF TORTS § 124 (2d ed. 2011) (an el-

ement of negligence is "the existence and amount of damages, based on actual harm"); RESTATEMENT (SECOND) OF TORTS § 402A (1965) (products liability torts require "physical harm"). And, to take just one statutory example, the Clean Water Act requires that a private plaintiff be "adversely affected" by the challenged conduct, 33 U.S.C. § 1365(g)—a phrase that reflects "[t]he constitutional requirement" of "injury in fact." *Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Found., Inc.*, 484 U.S. 49, 70 (1987) (Scalia, J., concurring) (citing *Middlesex County Sewerage Auth.* v. *Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 16 (1981)); see also Roberts, *supra*, 42 Duke L.J. at 1227 n.52.

But the FCRA—as construed by the Ninth Circuit—does not include such a requirement. See Pet. App. 6a ("[T]he statutory cause of action [under the FCRA] does not require a showing of actual harm when a plaintiff sues for willful violations.").

Nor did the Ninth Circuit rest its injury-in-fact determination on separate allegations by respondent that he had suffered or was imminently threatened with any of the forms of concrete harm that this Court has found sufficient to satisfy the injury-in-fact requirement, such as pecuniary loss; lost business opportunities; loss of enjoyment of public resources; and discriminatory treatment based on race, sex or some other prohibited characteristic. See, *e.g.*, *Hardin*, 390 U.S. at 5-6 (pecuniary loss); *Lexmark Int'l, Inc.* v. *Static Control Components, Inc.*, 134 S. Ct. 1377, 1386 (2014) (lost business opportunities); *Laidlaw*, 528 U.S. at 704-05 (loss of enjoyment of public resources); *Heckler* v. *Mathews*, 465 U.S. 728, 739-40 (1984) (discriminatory treatment).

The fact that a legal standard has been breached says nothing about whether any harm has been in-

flicted on anyone, let alone one of these "concrete," "actual," and "particularized" harms required to initiate judicial proceedings.

The court of appeals emphasized that respondent's claim of injury was sufficient because he alleged violations of "*his* statutory rights" as opposed to "the statutory rights of other people." Pet. App. 8a. But a plaintiff can almost always find a way to "personalize" a technical statutory violation notwithstanding the absence of any concrete harm. This approach would turn standing into "a lawyer's game, rather than a fundamental limitation ensuring that courts function as courts and not intrude on the politically accountable branches." *Massachusetts*, 549 U.S. at 548 (Roberts, C.J., dissenting).

Labeling a claim as one asserting a violation of "the plaintiff's rights" says nothing about whether the plaintiff has suffered any of the forms of concrete harm that the Court has recognized as sufficient to establish injury in fact.

Indeed, if every statutory violation with some connection to the plaintiff qualified as injury in fact, private plaintiffs and their counsel could "roam the country"—or the Internet—"in search of" legal violations in order "to reveal their discoveries in federal court" in the hopes of obtaining a bounty. *Valley Forge*, 454 U.S. at 487. Yet *Valley Forge* teaches that the assertion of a bare constitutional violation affords plaintiffs no such "special license," *ibid.*, and there is no reason why the assertion of a bare statutory violation should be any different.

The court of appeals' distinction of claims regarding "the statutory rights of other people" rings especially hollow given the close linkage between the "no harm" standing theory and the class action device.

Respondent here is effectively bootstrapping his "no harm" individual claim to justify a class action involving claims of statutory violations for millions of similarly unharmed individuals. At the end of the day, this is very much a case in which respondent is asserting "the statutory rights of other people."

Moreover, claims of statutory violations without concrete harm most clearly trigger the separation-of-powers concerns discussed above—particularly when asserted as class actions. They represent the transfer of the Executive's enforcement authority to private parties and pose a significant risk of fundamental unfairness.

Respondent's theory also would collapse this Court's three-part test for Article III standing—injury in fact, causation, and redressability—into the single question of whether there is an injury at law. Where the only injury arises from a violation of legal duty that had no palpable effect on the plaintiff, there is nothing to cause, and thus no meaning to the "causal connection" that is otherwise required. *Arizona Christian*, 131 S. Ct. at 1442. And once a congressionally authorized remedy made an abstract complaint "redressable" in the sense that the plaintiff could seek and collect payment, anyone authorized to sue by the statute would have standing. The Ninth Circuit recognized and embraced this anomaly, see Pet. App. 9a, despite its inconsistency with this Court's precedents.

And, of course, the "statutory violation equals injury in fact" theory would nullify this Court's decisions holding that Congress may not modify the injury-in-fact requirement. By holding that violation of a statute may qualify as injury in fact, the Ninth Circuit affords Congress carte blanche to circumvent

this Court's definition of injury in fact whenever it wishes to do so.

For all of these reasons, the Ninth Circuit's equation of statutory violation with injury in fact must be rejected.[7]

b. This Court Has Never Found Injury In Fact In The Absence Of Concrete Harm.

Respondent erroneously asserts that this Court's precedents support the Ninth Circuit's holding that injury-in-law may confer standing.

First, respondent relies on *Havens Realty Corp.* v. *Coleman*, 455 U.S. 363 (1982), in which the Court held that a black "tester" had standing to sue under the Fair Housing Act, which made it unlawful to "represent to any person because of race, color, religion, sex, * * * or national origin that any dwelling is not available * * * when such dwelling is in fact so available." 42 U.S.C. § 3604(d).

Contrary to respondent's assertions, *Havens* did not involve a bare violation of a statutory right unaccompanied by concrete harm. Instead, the plaintiff in

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[7] Respondent's claims regarding violations of statutory requirements relating to notices to those who furnish information, those who use information, and those who use information for employment purposes (15 U.S.C. §§ 1681b(b)(1), 1681e(d)(1)-(2)) do not qualify even under the Ninth Circuit's "personal statutory right" theory. Respondent does not explain how these claims about the alleged failure to provide notices to other parties relate to him. Nor does he allege harm to himself from petitioner's alleged failure to provide consumers with a toll-free number to request annual reports, which supposedly violated Section 1681j(a)(1)(C) and 12 C.F.R. § 1022.136 (formerly 16 C.F.R. § 610.3).

Havens was the direct victim of discrimination—which is itself a well-established form of concrete harm.

The facts in *Havens* make clear the concrete nature of the harm. On four separate occasions, the owner of an apartment complex falsely told the black tester that no apartments were available, while accurately telling a white tester on each occasion that apartments were available. *Havens*, 455 U.S. at 368.

Although the black tester had no intention of actually buying or renting a home, he nonetheless suffered the invidious and serious harm of discrimination on the basis of his race—"a type of personal injury [this Court] ha[s] long recognized as judicially cognizable." *Mathews*, 465 U.S. at 738. As this Court has explained, "discrimination itself, by perpetuating 'archaic and stereotypic notions' or by stigmatizing members of the disfavored group as 'innately inferior' and therefore as less worthy participants in the political community, can cause serious non-economic injuries to those persons who are personally denied equal treatment solely because of their membership in a disfavored group." *Id.* at 739-40 (citation omitted); see also *Allen*, 468 U.S. at 755.[8]

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[8] In support of its finding of injury in fact, the *Havens* Court cited another racial "tester" case, *Evers* v. *Dwyer*, 358 U.S. 202 (1958) (per curiam), which held that a black man who was ordered to the back of a bus pursuant to a local ordinance that imposed segregated seating arrangements had standing to challenge the ordinance, even though he appeared to "have boarded this particular bus for the purpose of instituting th[e] litigation." *Id.* at 204. It did not matter that the plaintiff "had ridden a bus * * * on only one occasion," because a person subjected to harmful "special disabilities" on account of his race has "a substantial, immediate, and real interest in the validity of the statute which imposes the disability." *Id.* at 203-04.

While *Havens* relied on a broad reading of the sentence in this Court's opinion in *Warth* discussed above (see pages 14-16, *supra*), *Havens* is entirely consistent with the Court's numerous subsequent decisions—including *Summers*, *Steel Co.*, and *Lujan*—recognizing the limitations imposed by Article III.

Second, respondent (Opp. 9-10) and the government (U.S. Pet. Am. Br. 12 & n.1) also relied on this Court's decisions in cases in which a plaintiff challenges the government's failure to comply with a statutory obligation to disclose information. *FEC* v. *Akins*, 524 U.S. 11, 21 (1998) (citing *Pub. Citizen* v. *Dep't of Justice*, 491 U.S. 440, 449 (1989)). In *Akins*, the Court held that a group of voters had standing to seek court review of the FEC's decision not to bring an enforcement action challenging, as a violation of the Federal Election Campaign Act of 1971, the failure of American Israel Public Affairs Committee to make certain information public. 524 U.S. at 13-14. And in *Public Citizen*, the Court held that interest groups had standing to sue the Department of Justice under the Federal Advisory Committee Act (FACA) for failing to disclose to the public its consultations with the American Bar Association's Standing Committee on Federal Judiciary in connection with evaluating potential judicial nominees. 491 U.S. at 448-51.

These decisions provide no support to respondent. As a threshold matter, respondent is not claiming that Spokeo failed to provide information to him. His contentions are that information about him provided to *other people* was inaccurate, and that certain statutorily required disclosures were not provided to third parties. These cases are therefore wholly inapposite.

Furthermore, neither *Akins* nor *Public Citizen* holds that the violation of a mere statutory right is *itself* the injury in fact. Rather, the Court grounded its decisions in the separate, particularized, concrete *effects* on the plaintiffs of the denial of access to the requested information.

The *Akins* Court stated that "the information would help [plaintiffs] (and others to whom they would communicate it) to evaluate candidates for public office, especially candidates who received assistance from AIPAC, and to evaluate the role that AIPAC's financial assistance might play in a specific election." 524 U.S. at 21. Because of these effects, the Court explained, the plaintiffs' "injury consequently seems concrete and particular." *Ibid.*; see also *id.* at 24-25 (the denial of information necessary to cast an informed vote is a deprivation "directly related to voting, the most basic of political rights," and therefore "sufficiently concrete and specific").

And in *Public Citizen*, the deprivation was of information the interest groups needed to scrutinize the "workings" of government in order to "participate more effectively in the judicial selection process." 491 U.S. at 449.

The Court in *Public Citizen* also considered the FACA claim analogous to one under the Freedom of Information Act (FOIA), 5 U.S.C. § 552. See 491 U.S. at 449 (collecting cases in which the Court implicitly found standing under FOIA when the plaintiffs "sought and were denied specific agency records"). As in the FOIA cases, the interest groups in *Public Citizen* had "sought and were denied specific agency records" that the law required the government to disclose. *Ibid.* That denial—following an actual, specific, concrete request for the information—was "a suffi-

ciently distinct injury to provide standing," *ibid.*, because it distinguished them from other citizens or interest groups who only "*might* make the same complaint," *id.* at 450 (emphasis added). See also Roberts, *supra*, 42 Duke L.J. at 1228 n.60 (discussing *Public Citizen*); cf. *Summers*, 555 U.S. at 496 ("[D]eprivation of a procedural right without some concrete interest that is affected by the deprivation * * * is insufficient to create Article III standing.").

More generally, the right of individuals to sue to compel *government* disclosure of information rests on a long-standing history in this country of mandamus actions—dating back to Marbury's suit against Madison—seeking to compel a government official to perform non-discretionary, ministerial duties required by law. See *Work* v. *U.S. ex rel. Rives*, 267 U.S. 175, 177 (1925) ("Mandamus issues to compel an officer to perform a purely ministerial duty.").

To the extent the kind of informational injury at issue in the FOIA cases or in *Public Citizen* may be transferred at all from the context of government inaction to suits between private parties—something that is far from clear—the fact that a plaintiff is required to make the specific request for information *before* invoking the judicial power ameliorates the separation-of-powers concerns raised above. Plaintiffs cannot simply go to court in the first instance whenever they desire information; rather, they suffer a concrete harm only when they first make a specific request for the information that is then denied. Indeed, if the request is granted, the individual cannot claim an injury and therefore cannot bring suit.

Third, respondent argued that the availability of nominal damages in certain circumstances shows that an injury at law may suffice to confer standing.

Opp. 14 & n.1. Again, respondent's contention is wrong.

Nominal damages at common law largely served the function of what are now declaratory judgments. See *Utah Animal Rights Coal.* v. *Salt Lake City Corp.*, 371 F.3d 1248, 1264-65 (10th Cir. 2004) (McConnell, J., concurring); DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES: CASES AND MATERIALS 561 (3d ed. 2002) ("The most obvious purpose [of nominal damages] was to obtain a form of declaratory relief in a legal system with no general declaratory judgment act."); 1 DAN B. DOBBS, LAW OF REMEDIES § 3.3(2), at 295 (2d ed. 1993).

Nominal damages allowed a party "to obtain an authoritative judicial determination of the parties' legal rights" to settle, for example, disputes over real property or to vindicate the plaintiff's reputation by proving the falsity of defamatory statements. *Utah Animal Rights Coal.*, 371 F.3d at 1264 (McConnell, J., concurring). Just as suits under the Declaratory Judgment Act are subject to Article III's limitations on the judicial power, see *Aetna Life Ins. Co.* v. *Haworth*, 300 U.S. 227, 239-41 (1937), so are suits seeking nominal damages.

Indeed, the kinds of suits in which nominal damages have been permitted involved instances of concrete harm. For example, *Webb* v. *Portland Mfg. Co.*, 29 F. Cas. 506 (C.C.D. Me. 1838), involved the diversion of water from the plaintiff's mill, but the diversion was too slight to have caused measurable damage. The plaintiff could nonetheless sue, Justice Story (riding circuit) explained, because if he "might not maintain an action for an injury, however small, to his right, a mere wrong-doer might, by repeated torts," establish his own adverse water rights and

thereby diminish the plaintiff's rights. *Id.* at 509; see also *Marzetti*, 109 Eng. Rep. at 844 (Taunton, J.) (noting the concern in trespass actions that a plaintiff who does not assert his property right will lose it); see also generally pages 25-26, *supra*.[9]

In sum, nominal damages thus are not available for every bare statutory violation; rather, they are permissible only in situations where the plaintiff can demonstrate actual or imminent concrete harm.

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[9] Nominal damages have also been awarded in patent infringement actions when the patentee failed to prove particular economic damage as a result of the infringement. See *Rude* v. *Westcott*, 130 U.S. 152, 167 (1889); *Black* v. *Thorne*, 111 U.S. 122, 124 (1884); *Blake* v. *Robertson*, 94 U.S. 728, 734 (1876); *Whittemore* v. *Cutter*, 29 F. Cas. 1120, 1121 (C.C.D. Mass. 1813) (Story, J.). But those decisions rest on the principle, well-recognized at the time, that patents protect a concrete property interest, rooted in the common law, in the ownership of one's invention; the injury caused by patent infringement therefore is not mere injury at law dictated by congressional fiat. See *Crown Die & Tool Co.* v. *Nye Tool & Mach. Works*, 261 U.S. 24, 35 (1923) (explaining that "the government did not confer on the patentee the right himself to make, use or vend his own invention," because "such right was a right under the common law").

And in *Carey* v. *Piphus*, 435 U.S. 247 (1978), the Court held that nominal damages are available for a procedural due process violation—there, the failure of school districts to provide the plaintiff students with appropriate procedural protections before suspending them—that, akin to the "wrongful deprivations of the right to vote" (*id.* at 265 n.22), plainly involved allegations of concrete harm. (The *Carey* plaintiffs alleged that the suspensions deprived them of educational benefits (in which the students had a "property interest," *Goss* v. *Lopez*, 419 U.S. 565, 576 (1975)).)

2. *A Right To Recover Statutory Damages Cannot Substitute For Concrete Harm.*

The Ninth Circuit also concluded that the availability of statutory damages under the FCRA obviated any need for respondent to show concrete harm. See Pet. App. 6a-7a. But as this Court made clear in *Vermont Agency*—which involved the payment afforded relators bringing *qui tam* actions under the federal False Claims Act—the potential recovery of a statutory bounty cannot serve as injury in fact.

The prospect of a statutory damages bounty may give a plaintiff a "concrete private interest" in the outcome of a suit, but that interest is "insufficient to give a plaintiff standing" because it is nothing more than "a wager upon the outcome" of the lawsuit and therefore "unrelated to injury in fact." *Vermont Agency*, 529 U.S. at 772. Indeed, a right to statutory damages "does not even fully materialize until the litigation is completed and the [plaintiff] prevails." *Id.* at 773.

"[A]n interest that is merely a 'byproduct' of the suit itself cannot give rise to a cognizable injury in fact for Article III standing purposes." *Ibid.*; see also *Steel Co.*, 523 U.S. at 107 ("[A] plaintiff cannot achieve standing to litigate a substantive issue by bringing suit for the costs of bringing suit."); *Diamond* v. *Charles*, 476 U.S. 54, 70-71 (1986) (holding that an award of attorney's fees assessed against an intervenor did not provide the intervenor with standing to continue the litigation, because that "injury * * * is only a byproduct of the suit itself" and thus is not "cognizable under Art. III").

For these reasons, the Court in *Vermont Agency* rejected the argument that the relator's interest in obtaining a statutory bounty could be a basis for his

standing. Instead, the Court concluded that the relator had standing *only* as a partial "assignee" of the *government's* "injury in fact." *Vermont Agency*, 529 U.S. at 773.

Statutory damages, moreover, "substitute for ordinary compensatory damages" that are difficult to quantify—"[w]hen a plaintiff seeks compensation for an *injury* that is likely to have occurred but difficult to establish." *Memphis Cmty. Sch. Dist.* v. *Stachura*, 477 U.S. 299, 310-11 (1986) (emphasis added; other emphasis omitted). "In those circumstances, presumed damages may roughly approximate the harm that the plaintiff suffered and thereby compensate for harms that may be impossible to measure." *Id.* at 311; see also *id.* at 311 n.14 (explaining that cases about the deprivation of voting rights, "going back to Lord Holt's decision in *Ashby* v. *White*, * * * involve nothing more than an award of presumed damages for a nonmonetary harm that cannot easily be quantified"); PROSSER ON TORTS, § 116A p. 843 (presumed damages are "an estimate, however rough, of the probable extent of *actual loss* a person had suffered and would suffer in the future") (emphasis added).

Respondent argued at the certiorari stage that the availability of statutory damages under the Copyright Act demonstrates that the violation of a "legal right per se" is sufficient for Article III standing. Opp. 14. But statutory damages for copyright are awarded on the same theory as other presumed damages—to avoid problems of quantification and proof in calculating actual damage. See *Douglas* v. *Cunningham*, 294 U.S. 207, 209 (1935) (explaining that statutory damages in the Copyright Act of 1909 "give the owner of a copyright some recompense for injury done him, in a case where the rules of law

render difficult or impossible proof of damages or discovery of profits").

Copyright confers a concrete "property" interest—"the right to exclude others"—upon which an infringer trespasses. *Fox Film Corp.* v. *Doyal*, 286 U.S. 123, 127 (1932). And the status of copyright as a protected "property" interest is not the product of mere congressional fiat either, but rather is well grounded in the common law. See *Feltner* v. *Columbia Pictures Television, Inc.*, 523 U.S. 340, 348-55 (1998) (observing that "[b]y the middle of the 17th century, the common law recognized an author's right to prevent the unauthorized publication of his manuscript" and collecting cases from English and early American practice); *Millar* v. *Taylor*, 98 Eng. Rep. 201, 252 (K.B. 1769) (Mansfield, C.J.) (the common law of copyright derived from the principle that "it is just, that an author should reap the *pecuniary profits* of his own ingenuity and Labour") (emphasis added).

Far from supporting the proposition that statutory damages suffice to satisfy the injury-in-fact requirement, the copyright laws thus provide yet another example in which Congress elevated to the status of legally cognizable claims the concrete harm that the copyright owner suffers when that interest is infringed.

3. Respondent Cannot Avoid The Concrete Harm Requirement By Analogizing His Claim To Common Law Defamation Actions.

Nor may respondent circumvent Congress's inability to manufacture injury in fact through his strained analogy, echoed by the government, between these alleged violations of the FCRA and a common

law defamation claim. See Opp. 3; U.S. Pet. Am. Br. 12-14.

To begin with, most of respondent's claims do not require proof of a false statement, and therefore cannot be analogized to defamation. See page 5 (citing J.A. 18-23) & page 40 note 7, *supra*.

Even with respect to the one claim that does require proof that information was false, the analogy fails. Publication of a false statement was not automatically actionable at common law. Proof of injury was and is required.

"The ground of the private action [for defamation] is the injury which the party has sustained, and his consequent right to damages as a recompense for that injury." 2 KENT, COMMENTARIES ON AMERICAN LAW 21 (1827); see also RESTATEMENT (SECOND) OF TORTS § 559 (1977) ("A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.").

Indeed, "[s]ince the latter half of the 16th century, the common law has afforded a cause of action for *damage* to a person's reputation by the publication of false *and defamatory* statements," *Milkovich*, 497 U.S. at 11 (emphases added), or, in other words, a "false publication that would subject [the plaintiff] to hatred, contempt, or ridicule," *id.* at 13 (quotation marks omitted). The law does not permit a claim for defamation unless the allegedly false statement has caused actual harm.

Nor does the presumption of injury in cases involving defamation *per se* help respondent. This Court has explained that the presumption is "an odd-

ity of tort law," *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 349 (1974), which "has been defended on the grounds that those forms of defamation that are actionable *per se are virtually certain to cause serious injury to reputation*, and that this kind of injury is extremely difficult to prove." *Carey* v. *Piphus*, 435 U.S. 247, 262 (1978) (emphasis added).

Under the common law as it existed at the founding, both here and in England, *per se* treatment was accorded only to false statements that would "expose [the plaintiff] to public hatred, contempt, and ridicule." 2 KENT at 13; 4 BLACKSTONE, COMMENTARIES *150; see *Milkovich*, 497 U.S. at 13; see also RESTATEMENT (SECOND) OF TORTS § 559 (1977). The categories were confined to statements falsely accusing the plaintiff of a crime, or of a condition that might "exclude him from society" or "impair or hurt his trade or livelihood." 3 BLACKSTONE, COMMENTARIES *123-24; 2 KENT at 13. Otherwise, the plaintiff was obligated to "aver some particular damage." 3 BLACKSTONE, COMMENTARIES *124 (clergyman slandered as a "bastard" must show that he lost a particular position); 2 KENT at 13. The presumption thus reaches *only* false information that exposes its subject "to hatred, contempt, or ridicule." *Milkovich*, 497 U.S. at 13 (quotation marks omitted); see also RESTATEMENT (SECOND) OF TORTS § 559 (1977).

Respondent cannot claim the benefit of the presumption here, because the alleged false statements do not satisfy the common law standard—indeed, they do not even come close. Petitioner allegedly made available information inaccurately stating that respondent was married with children and overstating his financial resources and education. None of those characteristics elicits "hatred, contempt, or rid-

icule." *Milkovich*, 497 U.S. at 13 (quotation marks omitted).

Finally, the defamation analogy also ignores the constitutional limitations on presuming injury from non-defamatory speech. As a plurality of this Court recently explained, the First Amendment protects false statements as well as true ones except when the statements reflect "defamation, fraud, or some other legally cognizable harm." *United States* v. *Alvarez*, 132 S. Ct. 2537, 2545 (2012) (plurality opinion).

4. Respondent's Allegations Fall Far Short Of The Required Concrete Harm.

Respondent argued below that Spokeo's publication of allegedly incorrect information inflicted concrete harm sufficient to satisfy the injury-in-fact standard. The district court rejected that contention, Pet. App. 13a-14a, 23a, and the Ninth Circuit did not address it, Pet. App. 9a. It is not clear whether respondent plans to advance this argument in support of the judgment below; in any event, the district court's determination was plainly correct.

In allegations that the Ninth Circuit labeled "sparse," Pet. App. 2a, respondent asserted that the very existence of inaccurate information about him harmed his "prospects" for employment, and that he was anxious about the possibility that a prospective employer might see that information and use it adversely against him. J.A. 14-15. That "highly attenuated chain of possibilities[] does not satisfy the requirement that threatened injury must be certainly impending" to satisfy Article III. *Clapper*, 133 S. Ct. at 1148.

This Court in *Clapper* "decline[d] to abandon [its] usual reluctance to endorse standing theories that rest on speculation about the decisions of independent actors" like the unknown employers who might have seen respondent's Spokeo search results. *Id.* at 1150. And respondent's claimed anxiety and stress about his speculation is as insufficient to satisfy the injury-in-fact requirement as was the "subjective fear of surveillance" that this Court found wanting in *Clapper*. *Id.* at 1153.

II. THE FCRA SHOULD NOT BE CONSTRUED TO PERMIT SUITS WITHOUT PROOF OF CONCRETE HARM.

If the Court concludes that a bare statutory violation can satisfy the injury-in-fact standard, the Court should hold that the FCRA does not open the federal courts to plaintiffs who are unable to demonstrate concrete harm, because Congress has not clearly stated its intent to do so.[10]

In a variety of contexts, the Court has required Congress to speak clearly—in the statutory text—before interpreting a law to disrupt the usual constitutional balance. See, *e.g.*, *Gregory* v. *Ashcroft*, 501 U.S. 452, 460 (1991); *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 17 (1981) (requiring Congress to "unambiguously" state any "condition on the

---

[10] The Court could reach the same result if it concluded that the constitutional question here is a difficult one. "[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, [the Court's] duty is to adopt the latter." *Jones* v. *United States*, 529 U.S. 848, 857 (2000) (quotation marks omitted). As the discussion in text below demonstrates, the FCRA is most reasonably interpreted not to relieve plaintiffs from demonstrating concrete harm.

grant of federal moneys" in spending programs involving the States). "[T]he requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *Bond* v. *United States*, 134 S. Ct. 2077, 2089 (2014) (quotation marks omitted); *Kucana* v. *Holder*, 558 U.S. 233, 237 (2010) ("Separation-of-powers concerns, moreover, caution us against reading legislation, absent clear statement, to place in executive hands authority to remove cases from the Judiciary's domain."); *Boumediene* v. *Bush*, 553 U.S. 723, 738 (2008) ("Congress should not be presumed to have effected such denial [of habeas relief] absent an unmistakably clear statement to the contrary."). By applying clear statement rules, the Court ensures that settled constitutional relationships will not be disturbed unless Congress has definitely decided to do so.

Indeed, in the standing context itself, Members of the Court have recognized the importance of congressional clarity in order to preserve the separation of powers on which standing doctrine rests. Thus, Justice Kennedy explained in *Lujan* that, because "the requirement of concrete injury confines the Judicial Branch to its proper, limited role in the constitutional framework of Government," when Congress seeks "to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before * * * Congress must at the very least identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit." *Lujan*, 504 U.S. at 580-81 (Kennedy, J., concurring); see also *Summers*, 555 U.S. at 501 (Kennedy, J., concurring) (respondents had no standing because "[n]othing in the statute at issue here * * * indicates Congress intended to identify or con-

fer some interest separate and apart from a procedural right").

In contrast, it would be "remarkable" and "unfortunate" to "hold[] that Congress may override the injury limitation of Article III" when "there is no indication that Congress embarked on such an ambitious undertaking." Roberts, *supra*, 42 Duke L.J. at 1227.

Any construction of the FCRA that would permit private suits in the absence of concrete harm would—as we have demonstrated—depart dramatically from existing standing doctrine and open the federal courts to a much broader range of claims and also upset the long-established division of powers among the Judiciary, Congress, and the Executive. The Court accordingly should not interpret the FCRA to abrogate the concrete harm requirement unless Congress clearly expressed its intent to do so. The FCRA contains no such clear statement.

The FCRA, in relevant part, provides simply that a negligent violation of its requirements "with respect to any consumer" subjects a consumer reporting agency to "actual damages," attorney's fees, and costs. 15 U.S.C. § 1681*o*(a). For a "willful" violation, meanwhile, a consumer may choose between "actual damages" and statutory "damages of not less than $100 and not more than $1,000," *id.* § 1681n(a)(1), and also may seek punitive damages. *Id.* § 1681n(a)(2). Nothing in these provisions indicates any intent to relieve plaintiffs of the requirement of demonstrating concrete harm as the prerequisite for a private lawsuit.

Indeed, the more plausible reading of Section 1681n is that, because it can be difficult to prove the *amount* of damages resulting from a defendant's failure to comply with the FCRA's procedural provi-

sions, Congress spared plaintiffs who have been concretely harmed by willful noncompliance from the burden of quantifying that harm, permitting an award between $100 and $1,000 at the district court's discretion. As the Court has observed, there is nothing "peculiar" about providing "only to those plaintiffs who can demonstrate actual damages" an award of "some guaranteed damages, as a form of presumed damages not requiring proof of amount." *Doe* v. *Chao*, 540 U.S. 614, 625 (2004) (construing the Privacy Act and pointing out that such a remedial scheme parallels the common law of defamation).

Because Congress has not clearly stated an intent to dispense with the traditional concrete harm requirement, this Court should hold that the FCRA preserves concrete harm as a prerequisite to private suits.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

Fair Credit Reporting Act,
15 U.S.C. § 1681 *et seq.*

15 U.S.C. § 1681a. Definitions; rules of construction

* * *

(d) CONSUMER REPORT.—

(1) IN GENERAL.—The term "consumer report" means any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for—

(A) credit or insurance to be used primarily for personal, family, or household purposes;

(B) employment purposes; or

(C) any other purpose authorized under section 1681b of this title.

* * *

(f) The term "consumer reporting agency" means any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports.

* * *

15 U.S.C. § 1681b. Permissible purposes of consumer reports

* * *

(b) Conditions for furnishing and using consumer reports for employment purposes

(1) Certification from user

A consumer reporting agency may furnish a consumer report for employment purposes only if—

(A) the person who obtains such report from the agency certifies to the agency that—

(i) the person has complied with paragraph (2) with respect to the consumer report, and the person will comply with paragraph (3) with respect to the consumer report if paragraph (3) becomes applicable; and

(ii) information from the consumer report will not be used in violation of any applicable Federal or State equal employment opportunity law or regulation; and

(B) the consumer reporting agency provides with the report, or has previously provided, a summary of the consumer's rights under this subchapter, as prescribed by the Bureau under section 1681g(c)(3) 1 of this title.

* * *

15 U.S.C. § 1681c. Requirements relating to information contained in consumer reports.

* * *

(g) Truncation of credit card and debit card numbers

(1) In general

Except as otherwise provided in this subsection, no person that accepts credit cards or debit cards for the transaction of business shall print more than the last 5 digits of the card number or the expiration date upon any receipt provided to the cardholder at the point of the sale or transaction.

* * *

15 U.S.C. § 1681e. Compliance procedures

* * *

(b) Accuracy of report

Whenever a consumer reporting agency prepares a consumer report it shall follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates.

* * *

(d) Notice to users and furnishers of information

(1) Notice requirement.—A consumer reporting agency shall provide to any person—

(A) who regularly and in the ordinary course of business furnishes information to the agency with respect to any consumer; or

(B) to whom a consumer report is provided by the agency;

a notice of such person's responsibilities under this subchapter.

* * *

15 U.S.C. § 1681j. Charges for certain disclosures

(a) Free annual disclosure

(1) Nationwide consumer reporting agencies

* * *

(C) Nationwide specialty consumer reporting agency

(i) In general

The Commission shall prescribe regulations applicable to each consumer reporting agency described in section 1681a of this title to require the establishment of a streamlined process for consumers to request consumer reports under subparagraph (A), which shall include, at a minimum, the establishment by each such agency of a toll-free telephone number for such requests.

* * *

15 U.S.C. § 1681n. Civil liability for willful noncompliance

(a) In general

Any person who willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of—

(1)(A) any actual damages sustained by the consumer as a result of the failure or damages of not less than $100 and not more than $1,000; or

(B) in the case of liability of a natural person for obtaining a consumer report under false pretenses or knowingly without a permissible purpose, actual damages sustained by the consumer as a result of the failure or $1,000, whichever is greater;

(2) such amount of punitive damages as the court may allow; and

(3) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

(b) Civil liability for knowing noncompliance

Any person who obtains a consumer report from a consumer reporting agency under false pretenses or knowingly without a permissible purpose shall be liable to the consumer reporting agency for actual damages sustained by the consumer reporting agency or $1,000, whichever is greater.

(c) Attorney's fees

Upon a finding by the court that an unsuccessful pleading, motion, or other paper filed in connection with an action under this section was filed in bad faith or for purposes of harassment, the court shall award to the prevailing party attorney's fees reasonable in relation to the work expended in responding to the pleading, motion, or other paper.

(d) Clarification of willful noncompliance

For the purposes of this section, any person who printed an expiration date on any receipt provided to a consumer cardholder at a point of sale or transaction between December 4, 2004, and June 3, 2008, but otherwise complied with the requirements of sec-

tion 1681c(g) of this title for such receipt shall not be in willful noncompliance with section 1681c(g) of this title by reason of printing such expiration date on the receipt.

15 U.S.C. § 1681o. Civil liability for negligent noncompliance

(a) In general

Any person who is negligent in failing to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of—

(1) any actual damages sustained by the consumer as a result of the failure; and

(2) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

(b) Attorney's fees

On a finding by the court that an unsuccessful pleading, motion, or other paper filed in connection with an action under this section was filed in bad faith or for purposes of harassment, the court shall award to the prevailing party attorney's fees reasonable in relation to the work expended in responding to the pleading, motion, or other paper.

RESPONDENT'S BRIEF

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IN THE

Supreme Court of the United States

SPOKEO, INC.,

Petitioner,

v.

THOMAS ROBINS, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS... i

TABLE OF CITED AUTHORITIES iv

BRIEF FOR RESPONDENT 1

STATEMENT.. 1

I. The Fair Credit Reporting Act..... 2

II. The Consumer Credit Reporting Reform Act...5

III. Spokeo's Business Practices 6

IV. Procedural History..... 8

SUMMARY OF ARGUMENT..... ..... .10

ARGUMENT. 15

I. Spokeo's Invasion Of Robins's Statutory Rights Under The Fair Credit Reporting Act Gives Him Article III Standing..... 15

A. A Concrete And Particularized Invasion Of A Statutory Right Is An Article III Injury.... 15

1. A centuries-long tradition supports courts hearing cases that allege violations of legal rights without any showing of consequential harm..... 15

Table of Contents

Page

a. The tradition of hearing actions without consequential harm was well-established by the time of the Framing..... 16

b. This tradition continued in American courts after the Framing..... 19

2. The invasion of a concrete and particularized statutory right is an Article III injury under this Court's decisions. 23

a. The statutory right invaded must be concrete and particularized to the plaintiff..... ...24

b. Spokeo's argument would require the Court to overturn *Havens* and *Public Citizen* 26

B. Robins Has Alleged A Concrete And Particularized Invasion Of His Statutory Rights By Spokeo.... 31

II. Robins Has Standing Even Under Spokeo's "Real-World" Injury Test..... 36

Table of Contents

Page

III. The Fair Credit Reporting Act's Relationship To Common-Law Defamation Confirms That Robins Has Standing. ..... .41

IV. Spokeo's Standing Test Undermines, Rather Than Promotes, The Separation Of Powers. 48

V. The Fair Credit Reporting Act Permits Recovery Of Statutory Damages For Willful Violations Without Proof Of Actual Damages. 52

VI. Policy Objections To Class Actions Are Irrelevant To The Question Of Article III Standing..... 54

CONCLUSION 57

TABLE OF CITED AUTHORITIES

Page

CASES

Aetna Life Ins. Co. v. Haworth,
300 U.S. 227 (1937). ..... .46

Allen v. Wright,
468 U.S. 737 (1984).... .... 26, 48

Ashby v. White,
(1703) 92 Eng. Rep. 126 (Q.B.) 18

Barnhart v. Sigmon Coal Co.,
534 U.S. 438 (2002) .... .56

Bernard v. Beale,
(1617) 79 Eng. Rep. 1241 (K.B.) 42

Bond v. Hilton,
47 N.C. (2 Jones) 149 (1855)..... ..21

Burwell v. Hobby Lobby Stores, Inc.,
134 S. Ct. 2751 (2014)..... .... .55

Carey v. Piphus,
435 U.S. 247 (1978)..... ...22

Clapper v. Amnesty Int'l USA,
133 S. Ct. 1138 (2013).....49

Clinton v. Mercer,
7 N.C. (3 Mur.) 119 (1819)..... 21

Cited Authorities

Page

Coleman v. Miller,
307 U.S. 433 (1939).... 16

Crittal v. Horner,
(1618) 80 Eng. Rep. 366 (K.B.) 17

Crogate v. Morris,
(1611) 123 Eng. Rep. 751 (C.P.)... 17

DaimlerChrysler Corp. v. Cuno,
547 U.S. 332 (2006).. 49

Doe v. Chao,
540 U.S. 614 (2004).... 54

Duke Power Co. v. Carolina Envtl. Study Grp., Inc.,
438 U.S. 59 (1978)..... 47

Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.,
472 U.S. 749 (1985)..... .... 42, 44

Dun v. Maier,
82 F. 169 (5th Cir. 1897)..... .... .44

FAA v. Cooper,
132 S. Ct. 1441 (2012)..... 54

FEC v. Akins,
524 U.S. 11 (1998).. 41

Cited Authorities

Page

Friends of Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.,
528 U.S. 167 (2000).... ....34, 40, 41

FTC v. Manager, Retail Credit Co.,
515 F.2d 988 (D.C. Cir. 1975)... 4

Gertz v. Robert Welch, Inc.,
418 U.S. 323 (1974).... 44

Halliburton Co. v. Erica P. John Fund, Inc.,
134 S. Ct. 2398 (2014)... ....

Hardin v. Ky. Utils. Co.,
390 U.S. 1 (1968)..... 50

Havens Realty Corp. v. Coleman,
455 U.S. 363 (1982)..... .... *passim*

Hein v. Freedom from Religion Found., Inc.,
551 U.S. 587 (2007)..... ....36, 40

Hermann v. Bradstreet Co.,
19 Mo. App. 227 (1885)..... .... .43

Hobson v. Todd,
(1790) 100 Eng. Rep. 900 (K.B.) 19

Hunt v. Dowman,
(1617) 79 Eng. Rep. 407 (K.B.) 17

Cited Authorities

Page

I. De S. & Wife v. W. de S., Y.B. Liber Assisarum,
22 Edw. 3, f. 99, pl. 60 (1348 or 1349) 17

INS v. St. Cyr,
533 U.S. 289 (2001) 52

Jenkins v. Smith,
(1620) 79 Eng. Rep. 501 (K.B.) 42

Joint Anti-Fascist Refugee Comm. v. McGrath,
341 U.S. 123 (1951) 48

Lance v. Coffman,
549 U.S. 437 (2007) 24, 38

Lansing v. Carpenter,
9 Wis. 540 (1859) 43

Lewis v. Casey,
518 U.S. 343 (1996) 30, 36, 48, 55

Lincoln v. Hapgood,
11 Mass. 350 (1814) 19

Linda R.S. v. Richard D.,
410 U.S. 614 (1973) .... .23

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992) .... *passim*

Cited Authorities

Page

M&G Polymers USA, LLC v. Tackett,
135 S. Ct. 926 (2015).... 33

Marbury v. Madison,
5 U.S. (1 Cranch) 137 (1803) 11, 20

Marye v. Parsons,
114 U.S. 325 (1885). 25

Marzetti v. Williams,
(1830) 109 Eng. Rep. 842 (K.B.) 19

Massachusetts v. EPA,
549 U.S. 497 (2007). .... .27, 34

McClurg v. Ross,
5 Binn. 218 (Pa. 1812)... .... .43

Memphis Cmty. Sch. Dist. v. Stachura,
477 U.S. 299 (1986)..... 22

Microsoft Corp. v. i4i Ltd. P'ship,
131 S. Ct. 2238 (2011). 55

Mitchell v. Bradstreet Co.,
22 S.W. 358 (Mo. 1893)..... 43

N. Pipeline Constr. Co. v. Marathon Pipe Line Co.,
458 U.S. 50 (1982)..... 1

Page

Nashville, C. & St. L. Ry. Co. v. Wallace,
288 U.S. 249 (1933)... .... .46

National Mut. Ins. Co. v. Tidewater Transfer Co.,
337 U.S. 582 (1949)... .... .50

Newbold v. J.M. Bradstreet & Son,
57 Md. 38 (1881) 43-44

Nixon v. Fitzgerald,
457 U.S. 731 (1982)..... 36

Norfolk & Wash. Steamboat Co. v. Davis,
12 App. D.C. 306 (D.C. Cir. 1898). 43

O'Shea v. Littleton,
414 U.S. 488 (1974).... .... 23, 24

Overnight Motor Transp. Co. v. Missel,
316 U.S. 572 (1942).... 41

Pollard v. Lyon,
91 U.S. 225 (1875). 45

Public Citizen v. Dep't of Justice,
491 U.S. 440 (1989).. .... *passim*

R v. Langley,
(1702) 90 Eng. Rep. 1261 (K.B.) ... .43

Page

Raines v. Byrd,
521 U.S. 811 (1997).... .... .11, 49

Robert Marys's Case,
(1613) 77 Eng. Rep. 895 (K.B.) 17

Runkle v. Meyer,
3 Yeates 518 (Pa. 1803) 43

Safeco Ins. Co. of Am. v. Burr,
551 U.S. 47 (2007)..... 2

Schlesinger v. Reservists Comm. to Stop the War,
418 U.S. 208 (1974)..... 30

Shepard v. NLRB,
459 U.S. 344 (1983)... 51

Simon v. E. Ky. Welfare Rights Org.,
426 U.S. 26 (1976)..... .... .38

Sprint Commc'ns Co., L.P. v. APCC Servs., Inc.,
554 U.S. 269 (2008)... .....16, 38, 40

Steel Co. v. Citizens for a Better Env't,
523 U.S. 83 (1998)..... .... *passim*

Summers v. Earth Island Inst.,
555 U.S. 488 (2009) 25, 26, 35

Cited Authorities

Page

Sun Printing & Publ'g Ass'n v. Moore,
183 U.S. 642 (1902)... .... .39

Susan B. Anthony List v. Driehaus,
134 S. Ct. 2334 (2014)..... .... .36

Tenn. Valley Auth. v. Hill,
437 U.S. 153 (1978)..... 55

Thorley v. Lord Kerry,
(1812) 128 Eng. Rep. 367 (K.B.) 43

Trafficante v. Metro. Life Ins. Co.,
409 U.S. 205 (1972). 50

United States v. Bethlehem Steel Co.,
205 U.S. 105 (1907)..... .... .39

United States v. Oakland Cannabis Buyers' Co-op.,
532 U.S. 483 (2001)..... .... .50

United States v. Woods,
134 S. Ct. 557 (2013). 53

Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.,
454 U.S. 464 (1982)..... 23

Vermont Agency of Natural Res. v. U.S. ex rel. Stevens,
529 U.S. 765 (2000). 12, 37, 38, 41

Page

Warger v. Shauers,
135 S. Ct. 521 (2014) 52

Warth v. Seldin,
422 U.S. 490 (1975)..... ....26, 27, 31, 38

Webb v. Portland Mfg. Co.,
29 F. Cas. 506 (C.C.D. Me. 1838) 20, 22

Weckerly v. Geyer,
11 Serg. & Rawle 35 (Pa. 1824)..... 19

Wells v. Watling,
(1788) 96 Eng. Rep. 726 (K.B.) 19

Wernsing v. Thompson,
423 F.3d 732 (7th Cir. 2005) 35

Whittemore v. Cutter,
29 F. Cas. 1120 (C.C.D. Mass. 1813)..... 21-22

Wilcox v. Plummer's Ex'rs,
29 U.S. (4 Pet.) 172 (1830) 21

STATUTES, LEGISLATIVE MATERIALS & SECONDARY SOURCES

U.S. Const. art. I... 25

U.S. Const. art. III .... *passim*

Cited Authorities

	Page
U.S. Const. art. III, § 2	1
5 U.S.C. § 552a(g)(4)(A)	54
15 U.S.C. § 1681	2, 4, 31
15 U.S.C. § 1681n	*passim*
15 U.S.C. § 1681o	54
42 U.S.C. § 3604	27
115 Cong. Rec. 2414 (1969)	2, 3, 46
141 Cong. Rec. 10,916 (1995)	6
S. Rep. No. 91-517 (1969)	2, 3, 5, 31
S. Rep. No. 104-185 (1995)	6, 32
Act of May 31, 1790, ch. 15, § 2, 1 Stat. 124	22-23
Consumer Information: Hearings Before the Subcomm. on Consumer Affairs of the Comm. on Banking, Currency, and Hous., 94th Cong., 1st Sess. 6 (1975)	5, 46
Fairness in Class Action Litigation Act, H.R. 1927, 114th Cong. (2015)	56

Page

FCRA, Pub. L. No. 91-508, 84 Stat. 1128 (1970) *passim*

Restatement (Second) of Contracts (1981) 21

Restatement (Second) of Torts (1977) 21, 44, 45

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Page

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BRIEF FOR RESPONDENT

Respondent Thomas Robins ("Robins"), on behalf of himself and others similarly situated, respectfully requests that this Court affirm the judgment of the United States Court of Appeals for the Ninth Circuit.

STATEMENT

Article III of the Constitution extends the judicial power of federal courts to "Cases" and "Controversies." U.S. Const. art. III, § 2. One private party alleging that another private party has invaded a personal legal right conferred on him by federal law is just such a case or controversy. After all, "[p]rivate-rights disputes"—those involving "the liability of one individual to another under the law as defined"—"lie at the core of the historically recognized judicial power." *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 70 (1982). That a case or controversy exists is even more apparent when, like here, it is a private dispute over a sum of money and the federal cause of action is one that would have been well known to the Framers.

Petitioner Spokeo, Inc. ("Spokeo") argues that Robins lacks Article III standing to bring his Fair Credit Reporting Act ("FCRA") claim in federal court because—according to Spokeo—its invasion of Robins's rights did not cause him "real-world" harm. Brief for Petitioner ("Pet. Br.") 9. Spokeo's novel "real-world" injury test, however, not only lacks any foundation in the Court's decisions or founding-era history, it does nothing to safeguard the separation-of-powers principles animating Article III's standing requirement. To the contrary, Spokeo's proposal

would create separation-of-powers problems by asking federal courts to encroach upon Congress's power to define and create remedies for private interests that it found important enough to warrant statutory protection.

I. The Fair Credit Reporting Act

Congress enacted the FCRA, Pub. L. No. 91-508, 84 Stat. 1128 (1970), to, among other things, "ensure fair and accurate credit reporting." *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 52 (2007). Congress recognized that "[p]erhaps the most serious problem in the credit reporting industry [was] the problem of inaccurate or misleading information." 115 Cong. Rec. 2414 (1969); S. Rep. No. 91-517, at 2-3 (1969). Credit bureaus "frequently confuse[d] one individual with another" and reproduced "[b]iased information" and "malicious gossip and hearsay." 115 Cong. Rec. 2414. To solve that problem, the FCRA requires "that consumer reporting agencies adopt reasonable procedures ... with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information[.]" 15 U.S.C. § 1681(b).

The FCRA's passage was preceded by decades of concern over inadequate protections against false statements regarding an individual's creditworthiness. Historically, "injuries that resulted from the dissemination of erroneous information by credit reporting agencies could be redressed through the common law action of defamation." Virginia G. Maurer, *Common Law Defamation and the Fair Credit Reporting Act*, 72 Geo. L.J. 95, 97 (1983). Under the common law, certain words (written or spoken) were considered so inevitably injurious that actual injury was presumed. An "action on the case"

could proceed "without proving any particular damage to have happened." 3 William Blackstone, Commentaries on the Laws of England *124 (1768).

By the early twentieth century, however, most American jurisdictions had adopted a "qualified privilege" for credit reporting agencies accused of defamation. *See* Maurer, *supra*, at 100. The effect of this privilege was to "place the burden of proving actual malice and actual damages on the plaintiff." *Id.* In addition, only the State of Oklahoma sought to regulate credit reporting agencies in any fashion. *See* 115 Cong. Rec. 2414. As a result, by the mid-twentieth century an individual who was "the subject of a credit report [was] all but unprotected in most jurisdictions." *Id.*

With the growth of consumer credit after World War II, "a vast credit reporting industry ... developed to supply credit information." S. Rep. No. 91-517, at 2. Credit bureaus, aided by "the growth of computer technology," began to supply information on millions of individuals' "financial status, bill paying record and items of public record such as arrests, suits, judgments," as well as "information on a person's character, habits, and morals," and "highly sensitive and personal information about a person's private life, such as racial or ethnic descent, domestic trouble, housekeeping habits, and conditions of yard." *Id.* at 2, 4.

By the 1960s, there was a consensus in Congress that the state legal regimes had failed to adapt their regulatory approach to the modern credit industry. In addition, Congress understood that because "unfair credit reporting methods undermine the public confidence which

is essential to the continued functioning of the banking system," it needed "to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy." 15 U.S.C. § 1681(a)(1), (a)(4).

The FCRA thus imposed "a comprehensive series of restrictions on the disclosure and use of credit information assembled by consumer reporting agencies." *FTC v. Manager, Retail Credit Co.*, 515 F.2d 988, 989 (D.C. Cir. 1975). In particular, the FCRA limited the purposes for which information could be supplied to third parties, FCRA § 604, banned disclosure of outdated information, *id.* § 605, required consumer reporting agencies preparing a consumer report to follow "reasonable procedures" to "assure maximum possible accuracy of the information concerning the individual about whom the report relates," *id.* § 607, and provided individuals with a means of ensuring that the information being distributed about them is accurate and updated, *id.* § 611. To enforce these provisions, the FCRA made any consumer reporting agency that had been "negligent in failing to comply with any requirement imposed under [the act] with respect to any consumer ... liable to that consumer in an amount equal to the sum of any actual damages sustained by the consumer as a result of the failure[.]" *Id.* § 617. Punitive damages were available for willful violations. *Id.* § 616.

At the same time, the FCRA preempted certain state-law claims by prohibiting "any action or proceeding in the nature of defamation, invasion of privacy, or negligence with respect to the reporting of information against any consumer reporting agency ... based on information disclosed pursuant to [the FCRA], except as to false

information furnished with malice or willful intent to injure such consumer." *Id.* § 610; *id.* § 622 (preempting any law "inconsistent with any provision of this title"). These provisions "federalized and transformed" "common law defamation in the credit reporting context ... into an action for negligence." Maurer, *supra*, at 115; S. Rep. No. 91-517, at 3 (noting that credit reporting agencies facing the possibility of new regulations in 29 states "expressed a preference for Federal regulation rather than State legislation").

II. The Consumer Credit Reporting Reform Act

Although the FCRA increased protections for consumers, it remained inadequate in several respects. One criticism was that the damages regime did "not always serve as a viable remedy." Lawrence D. Frenzel, *Fair Credit Reporting Act: The Case for Revision*, 10 Loy. L.A. L. Rev. 409, 429 (1977). "Civil actions brought pursuant to the [FCRA] tend[ed] to result in nominal—if any—damages to the consumer-plaintiff." *Id.* at 429-30; *see also* Robert R. Stauffer, Note, *Tenant Blacklisting: Tenant Screening Services and the Right to Privacy*, 24 Harv. J. on Legis. 239, 311 (1987) ("[I]t is often difficult to prove monetary damages for invasions of privacy. Privacy, after all, is not an economic right but a basic necessity of one's individuality."). There was "little incentive on the part of the consumer to bring an action under the statute, and as a result, reporting agencies [felt] no real compulsion to comply with the protective mechanisms of the Act." Frenzel, *supra*, at 430. There were numerous calls to amend the FCRA to "provid[e] for minimum liability or presumed damages when a violation is proven." Stauffer, *supra*, at 311; *see* Consumer Information: Hearings Before

the Subcomm. on Consumer Affairs of the Comm. on Banking, Currency, and Hous., 94th Cong., 1st Sess. 6, 62, 79, 105-06 (1975).

In 1996, Congress responded to "horror stories about inaccurate credit information and the inability of consumers to get the information corrected," 141 Cong. Rec. 10,916 (1995), by amending the FCRA to allow victims of "willful" violations to recover statutory damages of "not less than $100 and not more than $1,000." 15 U.S.C. § 1681n(a)(1)(A). Congress was "aware of concerns expressed by furnishers of information and the consumer reporting agencies that these provisions will result in unwarranted litigation," but believed it was warranted to protect "consumers who have been wronged." S. Rep. No. 104-185, at 48-49 (1995).

Congress also recognized that "the consumer reporting system handles almost two billion pieces of data per month and will never be perfectly accurate." *Id.* at 43. Consequently, it did not impose strict liability for the creation or dissemination of false credit reports. *Id.* Congress instead believed that adopting certain prophylactic and corrective measures designed to limit inaccuracies to the maximum extent possible would appropriately "balance the rights of consumers with those of consumer reporting agencies[.]" *Id.* at 49.

III. Spokeo's Business Practices

Spokeo owns and operates a website that in response to a free Internet query provides in-depth reports containing extensive personal information about individuals. The reports can include the person's address, an image of their

residence, their phone number, marital status, names of their siblings and parents, as well as age, occupation, education, ethnicity, property value, and hobbies. Joint Appendix ("JA") 7, 10-11. Spokeo's reports also include other personal information about their subjects, such as whether the individual "[h]as children," "[d]onates to environmental issues," "[h]as a swimming pool," or "[i]s not interested in politics." JA 10, 26. At no point does Spokeo ask permission from the individuals to publish their personal information. JA 49.

Spokeo markets its services to employers who want to evaluate prospective employees, as well as to those who want to investigate prospective romantic partners or seek other personal information. JA 9, 13, 38 n.12. Spokeo's webpage, for example, has featured a banner reading "HR Recruiters—Click Here Now!" *Id.* 36. Spokeo provides in-depth financial information about—and economic analysis of—the individuals on whom it reports. JA 7, 10, 40-41. This information includes, among other things, mortgage value, estimated income, and investments. JA 11. It also describes the subject's "economic health" on a scale from low to high, or as "average," "below average," or "very strong." JA 10-11. Spokeo users can also receive a report on a subject's "wealth level," rated on a scale from low to high, including a percentile such as "Bottom 40%" or "Top 10%." JA 11, 14.

Although Spokeo's reports contain extensive personal information, much of it is inaccurate. JA 11. Numerous investigative studies have documented the falsehoods in Spokeo's reports, including false statements concerning employment history, economic background, and home value. JA 11 n.1. Indeed, Spokeo itself is aware of

inaccuracies in the information it reports. Its founder, Harrison Tang, acknowledged these deficiencies in 2009, admitting that Spokeo "know[s] there are a lot of things we need to improve. There are algorithms we can do that we haven't had time to improve the inaccuracies [*sic*]. There's a lot of holes." JA 12.

Despite that admission, when individuals do learn of these falsehoods about themselves, they have little recourse. They often face barriers in correcting inaccuracies or removing their reports, as Spokeo has no effective system for allowing them to do so. *Id.* For example, individuals seeking to remove or correct their information will often receive emails informing them to "[p]lease try again tomorrow" because Spokeo "limit[s] the frequency of privacy requests" to "prevent abuse." *Id.* Even when successfully removed, an inaccurate report can reappear. JA 49. There often is nothing the subject of a report can do to keep Spokeo from disseminating a report filled with inaccurate personal information.

IV. Procedural History

Robins sued Spokeo in federal court under the FCRA. JA 6. Robins alleged that Spokeo created and made available for purchase an inaccurate report of his personal information. JA 13-14. While some of Spokeo's basic information about him in the report was accurate, almost everything else in its profile was not. In particular, Spokeo falsely reported that Robins (1) had a graduate degree (he does not); (2) is employed in a professional or technical field, his "economic health" was "very strong," and his wealth level was in the "Top 10%" (he is out of work and seeking employment); and (3) is in his 50s, is married,

and has children (he is not in his 50s, is unmarried, and has no children). JA 14. The report also included a photograph purporting to be of Robins that was not, in fact, of him. *Id.*

Robins further alleged that when Spokeo created this inaccurate report about him, it was aware of the inadequacies in its processes, was aware of its failure to follow the procedures the FCRA requires to assure maximum possible accuracy of the reports it generates, and, as a result, had willfully violated the FCRA. JA 20-23. Because Spokeo had failed to satisfy these obligations with respect to Robins, he was entitled to, among other things, declaratory relief, injunctive relief, and statutory damages. JA 25; 15 U.S.C. § 1681n(a) ("Any person who willfully fails to comply with any requirement imposed under this subchapter *with respect to any consumer is liable to that consumer*[.]") (emphasis added).

The district court initially denied Spokeo's motion to dismiss the amended complaint for lack of Article III standing. Petition Appendix ("App.") 17a-21a. The district court found that Robins had "alleged an injury in fact—the 'marketing of inaccurate consumer reporting information about Plaintiff'—that is fairly traceable to Defendant's conduct—alleged FCRA violations—and that is likely to be redressed by a favorable decision from this Court." App. 18a. After Spokeo sought interlocutory review, however, the district court reconsidered its previous ruling and granted Spokeo's motion to dismiss. App. 23a-24a. Robins timely appealed. JA 3.

The Ninth Circuit reversed, holding that Spokeo's alleged violations of Robins's FCRA rights met Article III's standing requirements for three reasons. App. 8a-9a.

First, although Congress's power to confer standing is not limitless, the "interests protected by the statutory rights at issue are sufficiently concrete and particularized that Congress can elevate them." App. 8a. Second, Robins had alleged that Spokeo "violated *his* statutory rights, not just the statutory rights of other people." *Id.* Third, Robins's personal interest in the proper handling of his credit information was "individualized rather than collective." *Id.*

SUMMARY OF ARGUMENT

Robins alleges that Spokeo willfully violated the personal rights that he holds under the FCRA. To redress that violation, he brought a private right of action that Congress created and seeks the statutory-damages remedy Congress provided. Article III demands no more. Centuries of common-law precedent, this Court's standing decisions, and separation-of-powers principles all disprove Spokeo's claim that a "bare" statutory violation without additional "real-world" harm is not a cognizable injury. No decision of this Court holds that Article III bars Congress from creating personal legal rights and fashioning monetary relief to redress them in federal court. Spokeo's plea to overturn this settled body of law should be rejected.

First, Robins has Article III standing because "the actual or threatened injury required by [Article] III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing." *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373 (1982) (citation and quotations omitted). Since the fourteenth century, the law has allowed litigants to bring actions asserting the invasion of legal rights of all sorts without having to demonstrate consequential harm. Chief Justice Marshall

understood it to be the "general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803). To that end, courts have long provided nominal damages to ensure that legal rights can be redressed. Congress likewise has, from the Nation's earliest days, provided statutory damages to ensure legal rights can be remedied in federal court. The FCRA follows this well-worn path.

To be sure, Article III imposes limits. Congress may not enact a statute, for example, giving every citizen the right "to require that the Government be administered according to law," and to expect it to be enforceable in federal court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 574 (1992). Article III requires that the invasion of a plaintiff's statutory right be "personal, particularized, concrete, and otherwise judicially cognizable." *Raines v. Byrd*, 521 U.S. 811, 820 (1997). But when it is, no more is required to establish standing.

Havens and *Public Citizen v. Department of Justice*, 491 U.S. 440 (1989), can be explained only on those terms. In both cases, the Court found Article III standing *only* because the plaintiffs' statutory rights had been invaded. In neither case did the Court require an allegation or proof of consequential harm. Those claims could be heard because Congress had created a statutory entitlement to information whose violation could be remedied through a private right of action to obtain monetary or equitable relief. That is, Congress met its Article III obligation to "identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit." *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in the judgment).

The FCRA meets this standard. The statute clearly identifies the interest Congress sought to vindicate: the harm individuals suffer from the dissemination of false credit reports created with inadequate procedures. The FCRA also clearly identifies the class of persons entitled to bring suit: the individual subjects of those inaccurate reports. Congress therefore granted that class of persons the right to enforce the "reasonable procedures" the FCRA requires credit reporting agencies to follow in order to protect this concrete statutory interest. And, when the violation is willful, the FCRA affords the subject of the inaccurate report statutory damages.

That is the claim Robins pleaded. The amended complaint alleged that the credit report Spokeo generated about him was inaccurate. It alleged that Spokeo willfully failed to comply with the FCRA. It alleged a connection between Robins's inaccurate report and Spokeo's violation of the FCRA. And it sought statutory damages as a remedy. Article III is no obstacle to hearing this dispute in federal court.

Second, Robins has standing to bring this claim even if a "real-world" injury were required. He has suffered a classic harm: Wallet Injury. Robins and Spokeo have a legal dispute over a fixed sum of money that turns on whether Spokeo violated Robins's legal interest under the FCRA. This right to statutory damages is not a "bounty" Robins "will receive if the suit is successful." *Vermont Agency of Natural Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 772 (2000). His right to statutory damages arose as soon as Spokeo violated his rights, and the monetary claim is his alone. Just as this Court would never, for purposes of Article III standing, look behind a liquidated-damages

clause to see if a breach of contract caused consequential harm, there is no basis to look behind FCRA's statutory-damages provision for some additional harm. Robins's monetary interest, which Congress determined would compensate him for the violation of his FCRA rights, satisfies even Spokeo's novel "real-world" injury test.

Third, the Court can find standing even without reaching the broader issues mentioned above because Robins's claims follow from the common law of defamation. At common law, written defamation and statements about one's trade or business were actionable absent special harm. The false statements the FCRA protects against (including those Spokeo made about Robins) are of the sort the common law would recognize. But even if the FCRA diverges from the common law to account for modern developments in the credit reporting industry, there is no reason to doubt Robins's standing. Article III does not force Congress to accept defamation law in its fossilized form. Indeed, the FCRA preempts state-law defamation claims and limits liability in many ways. The FCRA at its core protects a traditional private interest, but in a measured way that balances the interests of consumers and industry. These are the types of policy choices that legislatures are supposed to make.

Fourth, Spokeo's broad-brushed separation-of-powers argument is meritless. Congress's imposition of certain obligations on credit reporting agencies in order to protect the rights of consumers does not raise any of the separation-of-powers concerns that inform Article III. To the contrary, the only threat to separation of powers here is if the Court asserts broad authority to revisit Congress's determination that certain concrete interests

are worthy of legal protection, or if the Court assumes for itself the authority to hold that a statutory-damages remedy is categorically off-limits for certain violations of federal law. Either would be an unprecedented expansion of judicial power at Congress's expense.

Fifth, Spokeo's last-ditch statutory argument should be rejected. Not only is the constitutional avoidance doctrine inapplicable, Spokeo cannot even bring itself to explain how its interpretation of the statute can plausibly follow from the FCRA's text. That is because the FCRA authorizes a plaintiff to choose between actual *or* statutory damages. Actual damages are not a gateway to statutory damages. There is no other way to read the statute.

Sixth, and last, Spokeo dresses up policy concerns regarding class actions as a reason to distort Article III or rewrite the FCRA. It is inappropriate to ask the Court to weigh in on a longstanding policy dispute under the guise of constitutional or statutory interpretation. This Court decides cases according to neutral principles—not based on whether class actions are good or bad. If Spokeo believes legislative changes regarding class-action procedures are needed, it should address those complaints to Congress.

ARGUMENT

I. Spokeo's Invasion Of Robins's Statutory Rights Under The Fair Credit Reporting Act Gives Him Article III Standing.

Where, as here, one private party accuses another of invading a personal legal right conferred on him by federal statute, a case or controversy exists. Robins alleges that by creating a false credit report about him using inadequate procedures, Spokeo invaded his legal rights under the FCRA. This gives him Article III standing to sue over that personal violation without needing to show consequential harm.

A. A Concrete And Particularized Invasion Of A Statutory Right Is An Article III Injury.

The Framers understood "Cases" and "Controversies" to include suits asserting invasion of a private legal right, irrespective of consequential harm. Early American courts shared this understanding. And this Court's modern standing jurisprudence has repeatedly confirmed that the invasion of an individual's legal right—including a private right created by statute—is alone injury sufficient to support Article III standing.

1. A centuries-long tradition supports courts hearing cases that allege violations of legal rights without any showing of consequential harm.

"[H]istory and tradition offer a meaningful guide to the types of cases that Article III empowers federal

courts to consider." *Sprint Commc'ns Co., L.P. v. APCC Servs., Inc.*, 554 U.S. 269, 274 (2008). This is because "the framers of the Judiciary Article" understood that "[j]udicial power could come into play only in matters that were the traditional concern of the courts at Westminster and only if they arose in ways that to the expert feel of lawyers constituted 'Cases' or 'Controversies.'" *Coleman v. Miller*, 307 U.S. 433, 460 (1939) (opinion of Frankfurter, J.). Consequently, the judicial power applies to "cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102 (1998).

Here, history and tradition demonstrate that federal courts have long embraced the power to hear cases asserting—in Spokeo's words—a "bare violation" of an individual's legal rights. Contrary to Spokeo's contention, Pet. Br. 20-26, the rule that the invasion of a legally protected interest is actionable without consequential harm has a long history in Anglo-American law. Spokeo's ahistorical attack on the federal protection of individual legal rights should be rejected.

a. The tradition of hearing actions without consequential harm was well-established by the time of the Framing.

As early as the fourteenth century, courts recognized that the invasion of a private legal right was actionable without any further showing of harm. Indeed, in the "great-grandparent of all assault cases," Victor E. Schwartz *et al.*, Prosser, Wade, and Schwartz's Torts 34 (10th ed. 2000), the court allowed a suit (and awarded

damages) where the defendant swung a hatchet at a woman, but missed and "did no other harm." *I. De S. & Wife v. W. de S., Y.B. Liber Assisarum*, 22 Edw. 3, f. 99, pl. 60 (1348 or 1349) (reprinted in Prosser & Wade, Cases and Materials on Torts 36 (5th ed. 1971)). As Blackstone said, assault was "inchoate violence," and "no actual suffering is proved, yet the party injured may have redress[.]" Blackstone, *supra*, at *120. As to battery, too, Blackstone noted that every unlawful touching is actionable, whether "accompanied with pain ... [or] attended with none." *Id.*

Early English common-law decisions also recognized that actions could be maintained without any showing of "real-world" damage or "actual" harm by landholders who were the victims of harmless trespass, *see, e.g., Robert Marys's Case*, (1613) 77 Eng. Rep. 895 (K.B.); by persons who were the subject of numerous classes of slander, *see, e.g., Crittal v. Horner*, (1618) 80 Eng. Rep. 366 (K.B.); and by persons who were denied entry to exercise a right to inspect for waste, even though no waste was shown, *see, e.g., Hunt v. Dowman*, (1617) 79 Eng. Rep. 407 (K.B.).[1]

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1. Spokeo cites *Robert Marys's Case* and several other decisions for the principle that damage must always be proven, Pet. Br. 23, but fails to note the legal distinction made between commoners and landholders: "the lord of the soil shall have an action for trespass done in the waste or common, as an immediate trespass to him, be it greater or less, but the commoner shall not have an action but by consequence[.]" *Robert Marys's Case*, 77 Eng. Rep. at 899; Blackstone, *supra*, at *237 (noting that "for a trivial trespass the commoner has no action; but the lord of the soil only, for the entry and trespass committed"); *see, e.g., Crogate v. Morris*, (1611) 123 Eng. Rep. 751 (C.P.).

The principle permitting courts to hear suits alleging the invasion of a private right without any consequential damages was cemented in *Ashby v. White*, (1703) 92 Eng. Rep. 126 (Q.B.). In that case, the plaintiff alleged that his right to vote had been invaded, though the candidate for whom he intended to vote had won. In his seminal dissent, Lord Holt set forth the principle that still controls today: "Where a new Act of Parliament is made for the benefit of the subject, if a man be hindered from the enjoyment of it, he shall have an action against such person who so obstructed him." *Id.* at 136 (Lord Holt, C.J., dissenting). He rejected the view that infringement of the right to vote caused "no hurt or damage to the plaintiff." *Id.* at 137.

Lord Holt surveyed a number of common-law decisions supporting his view that "surely every injury imports a damage, though it does not cost the party one farthing, and it is impossible to prove the contrary; for a damage is not merely pecuniary, but an injury imports a damage, when a man is thereby hindered of his right." *Id.* It did not matter in *Ashby* that the plaintiff was unable to allege consequential harm; he had a legally protected right to vote, had been "obstructed of his right, and shall therefore have his action." *Id.* Lord Holt emphasized, and the House of Lords ultimately agreed, Pet. Br. 24, that the "bare" violation of a statutory right was just as actionable as violation of legal rights extended by the common law. *Ashby*, 92 Eng. Rep. at 136.

Forced to reframe *Ashby*, Spokeo selectively quotes from the journal of the House of Lords in an attempt to recast it as a case about ordinary property law, rather than impairment of the right to vote. Pet. Br. 25. This novel view is inconsistent with hundreds of years of case law

interpreting the decision. *See, e.g.*, *Lincoln v. Hapgood*, 11 Mass. 350, 355 (1814) (holding, without mention of any property interest, that "[t]he right of voting ... cannot be infringed without producing an injury to the party; and although the injury is not of a nature to be effectually repaired by a pecuniary compensation ... the suffering party should be permitted" to maintain a cause of action); *Weckerly v. Geyer*, 11 Serg. & Rawle 35, 39 (Pa. 1824) (applying Lord Holt's opinion to voting rights in a church election, with no mention of property interests).

The rule that where "any injury has been done by the defendant to the plaintiff ... the plaintiff is entitled to an action, without proving any specific damage," *Hobson v. Todd*, (1790) 100 Eng. Rep. 900, 901 (K.B.), continued to be a central tenet of English law in the late eighteenth and early nineteenth centuries. *See Wells v. Watling*, (1788) 96 Eng. Rep. 726 (K.B.) (allowing an action without consequential harm because "[i]t is sufficient if the right be injured, whether it be exercised or not"); *Marzetti v. Williams*, (1830) 109 Eng. Rep. 842 (K.B.) (permitting action for delay in payment of a note, from which no harm accrued); Blackstone, *supra*, at *23. The Framers' understanding of "Cases" and "Controversies" certainly would have included actions like these.

b. This tradition continued in American courts after the Framing.

The principle permitting individuals to vindicate invasions of their personal legal rights without pleading consequential damages was adopted in American courts without hesitation. Chief Justice Marshall understood it to be "'a general and indisputable rule, that where there is a

legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded.'" *Marbury*, 5 U.S. at 163 (quoting Blackstone, *supra*, at *23). And Justice Story did not mince words in rejecting, 175 years ago, precisely the argument Spokeo makes here:

> I am not able to understand, how it can correctly be said, in a legal sense, that an action will not lie, even in case of a wrong or violation of a right, unless it is followed by some perceptible damage, which can be established, as a matter of fact.... On the contrary, from my earliest reading, I have considered it laid up among the very elements of the common law, that, wherever there is a wrong, there is a remedy to redress it; and that every injury imports damage in the nature of it.... *Actual, perceptible damage is not indispensable as the foundation of an action.* The law tolerates no farther inquiry than whether there has been the violation of a right. If so, the party injured is entitled to maintain his action[.]

Webb v. Portland Mfg. Co., 29 F. Cas. 506, 507-08 (C.C.D. Me. 1838) (emphasis added). Indeed, Justice Story's decision in *Webb* surveyed more than twenty decisions in English and American courts applying the principle that "whenever there is a clear violation of a right, it is not necessary in an action of this sort to show actual damage; that every violation imports damage[.]" *Id.* at 509. Justice Story considered the case law so strong that the principle was "absolutely, in a juridical view, incontrovertible." *Id.* at 508.

Honoring this legal tradition, American courts have consistently heard common-law actions in a wide variety of contexts involving allegations of "bare violations" of legal rights without any showing of consequential harm. They hear assault cases even though "[i]t is not necessary that [the assault] should directly or indirectly cause any tangible and material harm[.]" Restatement (Second) of Torts § 21 cmt. c (1977). They hear trespass cases although the "presence on the land causes no harm to the land, its possessor, or to any thing or person in whose security the possessor has a legally protected interest," *id.* § 163, and, indeed, trespass is actionable even when "the possessor *benefits* from the trespass, as where the trespasser tears down a worthless building or prepares a field for cultivation," *id.* cmt. d (emphasis added). Courts also hear defamation cases "although no special harm results from the publication." *Id.* § 569; *infra* 42-44. They hear voter-interference cases "although the candidate for whom he would have voted would have been defeated even though he had voted." *Id.* § 865 cmt. a. And they hear contract cases "although no real loss be proved." *Clinton v. Mercer*, 7 N.C. (3 Mur.) 119, 120 (1819); *Wilcox v. Plummer's Ex'rs*, 29 U.S. (4 Pet.) 172, 182 (1830).

Such invasions of legal rights have often been redressed by nominal damages. *See, e.g.*, Restatement (Second) of Torts § 163 cmt. e (1977) (property rights); Restatement (Second) of Contracts § 346(2) (1981) (breach of contract). "Wherever there is a breach of an agreement, or the invasion of a right, the law infers some damage, and if no evidence is given of any particular amount of loss, it gives nominal damages, by way of declaring the right, upon the maxim, *ubi jus ibi remedium*." *Bond v. Hilton*, 47 N.C. (2 Jones) 149, 150-51 (1855); *see Whittemore v.*

Cutter, 29 F. Cas. 1120, 1121 (C.C.D. Mass. 1813) (Story, J.) ("Every violation of a right imports some damage, and if none other be proved, the law allows a nominal damage."). That longstanding tradition continues today. Nominal damages remain "the appropriate means of 'vindicating' rights whose deprivation has not caused actual, provable injury[.]" *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 308 n.11 (1986); *Carey v. Piphus*, 435 U.S. 247, 266 (1978).

Spokeo tries to minimize the widespread availability of nominal damages as a remedy for the invasion of legal rights, claiming they were merely an early substitute for declaratory judgments. Pet. Br. 45-46. But the availability of nominal damages was not limited only to the settlement of ongoing legal disputes, or the clearing of one's name. Rather, they implement the principle that "[t]he law tolerates no farther inquiry than whether there has been the violation of a right. If so, the party injured is entitled to maintain his action for nominal damages, in vindication of his right, if no other damages are fit and proper to remunerate him." *Webb*, 29 F. Cas. at 507. In any event, even after the enactment of the Declaratory Judgment Act, actions for "nominal damages without proof of actual injury" were made available in the constitutional-rights context. *Carey*, 435 U.S. at 266.

Moreover, Congress has long provided remedies, in the form of statutory damages, for the invasion of rights—even absent consequential harm. In 1790, for example, the First Congress required those infringing an individual's copyright to "pay the sum of fifty cents for every sheet," half to the owner and half to the government; no proof of actual loss was required. Act of May 31, 1790, ch. 15, § 2,

1 Stat. 124, 124-125; Theodore Sedgwick, *A Treatise on the Measure of Damages* 571 (1847) (describing the "large class of cases" where legislatures "endeavored to put a stop to all inquiry into the actual damages by fixing an arbitrary sum as the measure of relief").

Simply put, for centuries—both before and after the Framing—the courts and Congress have provided a variety of remedies to redress the invasion of legal rights irrespective of consequential damage. History thus shows that Robins's case against Spokeo is "of the sort traditionally amenable to, and resolved by, the judicial process." *Steel Co.*, 523 U.S. at 102. Adherence to the common-law tradition means that courts will "always hear the case of a litigant who asserts the violation of a legal right." Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U. L. Rev. 881, 885 (1983).

2. The invasion of a concrete and particularized statutory right is an Article III injury under this Court's decisions.

Consistent with this long tradition, it is settled that "Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute." *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973); *see O'Shea v. Littleton*, 414 U.S. 488, 493 n.2 (1974) (same); *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 487 n.24 (1982) (same). That rule follows from first principles and precedent, and there is no basis for overturning it in this case.

a. The statutory right invaded must be concrete and particularized to the plaintiff.

Statutory rights are as worthy of judicial protection as common-law and constitutional rights because "there is absolutely no basis for making the Article III inquiry turn on the source of the asserted right." *Lujan*, 504 U.S. at 576. Accordingly, "the actual or threatened injury required by Art[icle] III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing." *Havens*, 455 U.S. at 373 (internal quotations omitted). For that reason, "[standing's] existence in a given case is largely within the control of Congress." Scalia, *supra*, at 885.

That said, this principle—that Congress can define new legal rights, the invasion of which is an injury sufficient to support Article III standing—is not without limits. "Abstract injury is not enough." *O'Shea*, 414 U.S. at 494. Congress may not "abandon[] the requirement that the party seeking [redress in federal court] must himself have suffered an injury." *Lujan*, 504 U.S. at 578. "'The province of the court,'" after all, "'is, solely, to decide on the rights of individuals.'" *Id.* at 576 (quoting *Marbury*, 5 U.S. at 170). "While it does not matter how many persons have been injured by the challenged action, the party bringing suit must show that the action injures him in a concrete and personal way." *Id.* at 580 (Kennedy, J., concurring in part and concurring in judgment). "To have standing," then, "a plaintiff must have more than 'a general interest common to all members of the public.'" *Lance v. Coffman*, 549 U.S. 437, 440 (2007) (*per curiam*) (quoting *Ex Parte Levitt*, 302 U.S. 633, 634 (1937)). "[N]o

court sits to determine questions of law *in thesi*." *Marye v. Parsons*, 114 U.S. 325, 330 (1885).

This bar on suits asserting abstract, speculative, and generalized grievances—not Spokeo's "real-world" harm test—is the "hard floor" of Article III that Congress cannot remove by statute. *Summers v. Earth Island Inst.*, 555 U.S. 488, 497 (2009). This Court has never held that "injury in fact" excludes legal injuries. Indeed, *Lujan* could not be clearer: "the plaintiff must have suffered an injury in fact—*an invasion of a legally protected interest* which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." 504 U.S. at 560 (citations and quotations omitted) (emphasis added). This line between abstract, speculative, and generalized grievances on the one hand, and concrete, actual, and particularized invasions of legal rights on the other, is what defines Article III standing. When the statutory right meets these criteria, the invasion of it is the "injury in fact."[2]

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2. Spokeo seeks in vain for support in *Lujan*'s statement "that Congress may 'elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law.'" Pet. Br. 14 (quoting *Lujan*, 504 U.S. at 578). But *Lujan* did not purport to resolve the issue here. The Court explained that it was not deciding whether Article III "can be extended beyond that distinction." *Lujan*, 504 U.S. at 578. Moreover, Justice Kennedy explained that Congress does have the authority to create new legal rights, and joined that part of the decision on the understanding that it did not "suggest a contrary view." *Id.* at 580 (Kennedy, J., concurring in part and concurring in the judgment). Indeed, holding that Congress lacks such Article I authority would create significant separation-of-powers problems. *See infra* 48-52.

As a consequence, while the "public's ... interest in the proper administration of the laws" is "nonconcrete," *Summers*, 555 U.S. at 497 (quotation omitted), an *individual's* interest in vindicating *her own* legal rights *is* concrete, Scalia, *supra*, at 895 (defining "concrete injury" to mean "an injury apart from the mere breach of the social contract, so to speak, effected by the very fact of unlawful government action"). Consistent with this settled understanding, only those statutes creating concrete legal interests will satisfy Article III, and even then, only those persons who can allege and prove that they themselves have suffered an invasion of that statutory interest will have standing.

To that end, "Congress must at the very least identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit." *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in the judgment). For their part, plaintiffs "must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent." *Warth v. Seldin*, 422 U.S. 490, 502 (1975). When these conditions are satisfied (as they are here, *see infra* 31-36), the violation of the plaintiff's statutory right is an Article III injury.

b. Spokeo's argument would require the Court to overturn *Havens* and *Public Citizen*.

"Like most legal notions, the standing concepts have gained considerable definition from developing case law." *Allen v. Wright*, 468 U.S. 737, 751 (1984). *Havens* and

Public Citizen apply the principle, set forth above, that "Congress may create a statutory right or entitlement the alleged deprivation of which can confer standing to sue even where the plaintiff would have suffered no cognizable injury in the absence of the statute." *Warth*, 422 U.S. at 514; *Massachusetts v. EPA*, 549 U.S. 497, 516 (2007) ("Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before.") (quoting *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in judgment)). The Court should adhere to these decisions.

Havens involved a challenge under the Fair Housing Act ("FHA"), which, among other things, made it unlawful "[t]o represent to any person because of race ... that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available." 42 U.S.C. § 3604(d). In doing so, the FHA "establishe[d] an enforceable right to truthful information concerning the availability of housing[.]" *Havens*, 455 U.S. at 373. In that case, a black "tester" employed by a public-interest organization inquired about the availability of certain apartments. *Id.* at 368. When the apartment complex owner told her—falsely—that there were no apartments for rent, she (among others) brought suit. *Id.* at 367-68. This Court squarely held that the tester had Article III standing because she "alleged injury to her statutorily created right to truthful housing information." *Id.* at 374. The tester "suffered injury in precisely the form the statute was intended to guard against, and therefore ha[d] standing to maintain a claim for damages under the [statute's] provisions." *Id.* at 373-74.

This concrete and particularized invasion of her statutory right *alone* was an injury sufficient to support standing: "That the tester may have approached the real estate agent fully expecting that [s]he would receive false information, and without any intention of buying or renting a home, does not negate the simple fact of injury within the meaning of [the statute]." *Id.* In other words, the tester did not need to allege anything more than the "bare violation" of the FHA; the defendant's invasion of her personal legal right under the statute was all Article III required.

Spokeo claims that "the plaintiff in *Havens* was the direct victim of discrimination—which is itself a well-established form of concrete harm." Pet. Br. 40-41. But that is not how the Court characterized the tester's injury. The Court explained that the tester, who claimed to have been lied to four separate times, had sufficiently "alleged injury to her statutorily created right to truthful information." *Havens*, 455 U.S. at 374. Spokeo may wish that the Court had resolved Article III standing on discrimination, but that is not what *Havens* holds.

The Court's dismissal of the claim of a white tester who had not been given false information by the property owner proves the point. Because he had not alleged being misled, the white tester "alleged no injury to his statutory right to accurate information concerning the availability of housing." *Id.* at 374-75. The failure to plead that he was the victim of discrimination was relevant only to whether he stated a claim. By not "alleg[ing] that he was a victim of a discriminatory misrepresentation, he [had] not pleaded a cause of action under [the statute]." *Id.* at 375. But that had nothing to do with whether the white

tester's legal right to truthful housing information had been invaded, *viz.*, whether he suffered an injury. If, as Spokeo argues, the "real-world" injury of discrimination were the foundation for Article III standing in *Havens*, the Court would not have described it as merely an element of the cause of action.

Public Citizen likewise depends on the principle that a concrete and particularized invasion of a legal right alone supports Article III standing. 491 U.S. at 449-50. There, the Court held that persons seeking access to public records under the Federal Advisory Committee Act ("FACA") had Article III standing to challenge the defendant's refusal to permit them such access. *Id.* at 451. No other harm was needed beyond the denial of the statutory right of access. The Court understood that any other conclusion would raise questions about the kind of showing needed to allege Article III standing under the Freedom of Information Act ("FOIA") because there had been no suggestion—by any court—"that those requesting information under" FOIA needed to "show more than that they sought and were denied specific agency records." *Id.* at 449 (collecting cases).

The fact that FACA and FOIA plaintiffs need not show any consequential injury from denial of access defeats Spokeo's theory. By Spokeo's logic, denial of a FACA or FOIA request alone would never be enough to establish Article III standing; the requester would need to allege some "real-world" harm from the denial of access. But that was not the conclusion the Court reached in *Public Citizen*. Instead, FACA and FOIA plaintiffs suffer an Article III injury solely because their statutory right to these records has been infringed.

Spokeo weakly contends there was consequential harm underlying the plaintiff's FACA claim in *Public Citizen*: the inability "to scrutinize the 'workings' of government ... to 'participate more effectively in the judicial selection process.'" Pet. Br. 43 (quoting *Pub. Citizen*, 491 U.S. at 449). But this was not an independent harm the Court required to establish Article III standing; it was the reason why Congress created the statutory right. *Compare Pub. Citizen*, 491 U.S. at 449, *with id.* at 445-46. Adhering to the FOIA line of decisions, the Court held that no such showing was needed for Article III standing. *Id.* at 449-50.

Spokeo also claims that, unlike *Havens* and *Public Citizen*, this case is about providing information to other people—not to Robins. Pet. Br. 42. But of course the class of persons entitled to bring suit will differ based on the contours of the interest Congress created. The fact that the FHA, FACA, and FOIA protect seekers of information while the FCRA protects the subjects of informational reports about their creditworthiness has absolutely no relevance to the fact that a concrete and particularized invasion of the individual legal rights those statutes created is an Article III injury. Spokeo's theory of "real-world" injury cannot be reconciled with either *Havens* or *Public Citizen*.[3]

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3. In two decisions in which the plaintiffs lacked standing, the Court illustrated how Congress could have created a legal right. *See Lewis v. Casey*, 518 U.S. 343, 353 n.4 (1996) ("Unless prisoners have a freestanding right to libraries, a showing of the sort Justice Souter describes would establish no *relevant* injury in fact, *i.e.*, injury-in-fact *caused by the violation of legal right*."); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 224 n.14 (1974) ("The District Court made analogy to conflict-of-interest statutes

B. Robins Has Alleged A Concrete And Particularized Invasion Of His Statutory Rights By Spokeo.

Application of these longstanding principles shows that Robins has Article III standing. Because his amended complaint was dismissed at the pleading stage, his factual allegations must be treated as true. *Warth*, 422 U.S. at 521. As explained below, Robins's amended complaint clearly alleged a concrete and particularized invasion of *his* own legal rights under the FCRA, and this invasion is the injury needed to establish standing.

To begin, the FCRA is trained on a specific, congressionally-identified harm. The FCRA's purpose "is to prevent consumers from being unjustly damaged because of inaccurate or arbitrary information in a credit report." S. Rep. No. 91-517, at 1; *see supra* 2-6. The statute seeks to ensure that credit reporting agencies create reports only "in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information[.]" 15 U.S.C. § 1681(b). The FCRA's centerpiece provision thus requires credit reporting agencies to take "reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates." *Id.* § 1681e(b). Such procedures similarly ensure that the subject of a credit report is protected

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which, it said, are directed at avoiding circumstances of potential, not actual, impropriety. We have no doubt that if the Congress enacted a statute creating such a legal right, the requisite injury for standing would be found in an invasion of that right."). The Court's hypotheticals presume that Congress has the very power that Spokeo claims it lacks.

from the mishandling of his information. *See supra* 4. Congress "identif[ied] the injury it seeks to vindicate" when it created a federal cause of action under the FCRA. *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in the judgment).[4]

Congress also has "relate[d] the injury to the class of persons entitled to bring suit." *Id.* The FCRA is intended to protect "consumers who have been wronged" by credit reporting agencies. S. Rep. No. 104-185, at 48-49. To that end, the statute provides that "[a]ny person who willfully fails to comply with any requirement imposed under this subchapter *with respect to any consumer is liable to that consumer*[.]" 15 U.S.C. § 1681n(a)(1)(A) (emphasis added). In other words, Congress identified inaccurate credit reports as causing harm to their subjects, it mandated procedures designed to prevent the creation of such inaccurate reports, and it provided a cause of action to consumers about whom false credit reports are created in willful noncompliance of those procedures.

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4. Spokeo asks the Court to require a "clear statement" from Congress before finding that "plaintiffs who are unable to demonstrate concrete harm" have Article III standing. Pet. Br. 53. But Congress is not affording standing to such plaintiffs. Impairment of Robins's statutory interest under the FCRA *is* concrete and particularized harm. If Spokeo instead is arguing that a clear statement is required before Congress may define injuries, there is no basis for it given the lack of any separation-of-powers concerns raised here. *See infra* 48-52. Regardless, as discussed above, the FCRA could not be clearer in its intention to give a right to sue to consumers whose interest in an accurate credit report has been impaired.

In sum, the FCRA affords wronged consumers a legal right to enforce "procedural requirement[s] the disregard of which could impair" their "concrete interest" in an accurate credit report. *Lujan*, 504 U.S. at 572. That is the claim Robins brought. In particular, he alleges that "Spokeo maintains an inaccurate consumer report about [him] on its website." JA 13. The amended complaint thereby alleges that Robins's concrete statutory right was "affect[ed] in a personal and individual way." *Lujan*, 504 U.S. at 560 n.1; *see id.* at 581 (Kennedy, J., concurring in part and concurring in the judgment) (same). Because he alleges that *his* statutory rights were invaded when a false report was created about *him*, Robins's claim that Spokeo violated the FCRA "will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Id.* (quoting *Valley Forge*, 454 U.S. at 472).

After detailing many ways in which Spokeo failed to comply with the FCRA, JA 30, the amended complaint alleged that Spokeo willfully and "continually failed to follow reasonable procedures" that are designed "to assure the maximum possible accuracy of the information that it provides in its consumer reports," JA 21.[5] Robins

5. In passing, Spokeo asserts that Robins lacks standing to bring certain ancillary claims relating to FCRA violations set forth in the amended complaint. Pet. Br. 40 n.7. As the lower courts recognized, those allegations are appropriately understood as supporting Robins's overarching claim that Spokeo's inadequate procedures led to its inaccurate report about him and his inability to correct those inaccuracies. *See* App. 4a-5a, 16a. To the extent those allegations raise issues separate and apart from that question, such issues were not decided below and are not before the Court. *M&G Polymers USA, LLC v. Tackett*, 135 S. Ct. 926 (2015).

met his burden to plead Article III standing. *See Lujan*, 504 U.S. at 561 ("At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim.") (citation and quotations omitted).

In addition, Spokeo does not and cannot contest that the injury alleged by Robins "is fairly traceable to the challenged action of the defendant" and "will be redressed by a favorable decision." *Friends of Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000). As to traceability, the amended complaint alleges that Spokeo's willful failure to follow the procedures mandated by the FCRA resulted in the inaccurate credit report about him. JA 21-23. That is sufficient: Robins need not "establish"—let alone plead—"with any certainty" that the credit report created about him would have been accurate if Spokeo had followed the proper procedures. *Lujan*, 504 U.S. at 572 n.7; *Massachusetts*, 549 U.S. at 518 ("A [litigant] who alleges a deprivation of a procedural protection to which he is entitled never has to prove that if he had received the procedure the substantive result would have been altered. All that is necessary is to show that the procedural step was connected to the substantive result.") (citations and quotations omitted).

Regarding redressability, the FCRA has afforded Robins statutory damages for Spokeo's willful violation of the FCRA's procedural requirements and concomitant dissemination of false information about him. JA 21-23. Damages are the paradigmatic remedy for a completed statutory violation. "Generally, any person whose injury can be redressed by a favorable judgment has standing to

litigate, and injuries compensable in monetary damages can always be redressed by a court judgment." *Wernsing v. Thompson*, 423 F.3d 732, 745 (7th Cir. 2005) (internal citations and quotations omitted). Robins's "continued active pursuit of monetary relief" ensures that "this case remains definite and concrete, touching the legal relations of parties having adverse legal interests." *Havens*, 455 U.S. at 371 (citations and quotations omitted). His injury is redressable.

Finally, resolution of this appeal in favor of Robins would not call *Lujan* or *Summers* into doubt. As an initial matter, *Lujan* was resolved on imminency and redressability grounds inapplicable here. *See* 504 U.S. at 564-71. More importantly, neither statute at issue in those cases protected a concrete statutory interest afforded to a specific class of persons. The "citizen-suit provision" of the Endangered Species Act is a "congressional conferral upon *all* persons of an abstract, self-contained, noninstrumental 'right' to have the Executive observe the procedures required by law." *Id.* at 572-73. The Forest Service Decisionmaking and Appeals Reform Act also afforded the general public "a procedural right without some concrete interest that [was] affected by the deprivation—a procedural right *in vacuo*[.]" *Summers*, 555 U.S. at 496. In short, the legal claims in both *Lujan* and *Summers* failed because neither statute "indicate[d] Congress intended to identify or confer some interest separate and apart from a procedural right." *Id.* at 501 (Kennedy, J., concurring).

That is not true here, though. The FCRA's procedural requirements were specifically designed to protect a wronged consumer's concrete interest in the accuracy of

a credit report created about him. Far from a generalized grievance, Robins brings a claim for relief from the unlawful preparation of an inaccurate credit report about *him*. Robins has Article III standing.

II. Robins Has Standing Even Under Spokeo's "Real-World" Injury Test.

Robins also has suffered precisely the kind of "real-world" injury Spokeo demands: Wallet Injury. "Wallet Injury"—an injury with tangible economic consequences—"is the type of concrete and particularized injury" that provides the basis for standing. *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 619 (2007) (Scalia, J., concurring in the judgment); *see Nixon v. Fitzgerald*, 457 U.S. 731, 744 (1982). It is the typical interest that can be "settled, bought, and sold." *Casey*, 518 U.S. at 353 n.3.

As soon as Spokeo willfully invaded Robins's legal rights under the FCRA by creating a false report about him without using procedures mandated by the statute, he was entitled to statutory damages. *See* 15 U.S.C. § 1681n(a). His claim for those damages created a classic legal dispute over whether one party (here, Spokeo) owes another (Robins) a fixed sum of money. Spokeo's failure to compensate Robins is a monetary—or wallet—injury. The FCRA's provision for statutory damages thus affords Robins the "personal stake in the outcome of the controversy" that Article III requires. *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014) (quoting *Warth*, 422 U.S. at 498). At bottom, the central question has always been "whether a plaintiff personally would benefit in a tangible way from the court's intervention."

Steel Co., 523 U.S. at 103 n.5 (citations and quotations omitted). Because he would, Robins has Article III standing, even under the misguided test that Spokeo advances.

Spokeo's responses all miss the mark. Spokeo principally argues that "the potential recovery of a statutory bounty cannot serve as injury in fact." Pet. Br. 47 (citing *Vermont*, 529 U.S. at 772). But Spokeo's attempt to elide the distinction between a *qui tam* relator's bounty and a private litigant's statutory damages is unavailing. A relator has standing only as an assignee because he has sued "to remedy an injury in fact suffered by the United States." *Vermont*, 529 U.S. at 771. Article III standing, however, requires the vindication of a personal "interest" in "obtaining compensation for, or preventing, the violation of a legally protected right." *Id.* at 772 (citation omitted).

Because the relator in *Vermont* only had "an interest *in the lawsuit*," he "suffered no such invasion—indeed, the 'right' he seeks to vindicate does not even fully materialize until the litigation is completed and the relator prevails." *Id.* at 772-73. That was "not to suggest that Congress cannot define new legal rights, which will confer standing to vindicate an injury caused by the claimant." *Id.* at 773 (citing *Warth*, 422 U.S. at 500). But the relator's "bounty" was "an interest that is merely a byproduct of the suit itself" and, therefore, it could not "give rise to a cognizable injury in fact for Article III standing purposes." *Id.*

Robins's statutory interest is fundamentally different. Unlike the relator, Robins holds his own legally protected right under the FCRA; it is *that* interest he seeks to vindicate. In other words, he does not seek to enforce

someone else's rights; the interest is his alone. There can be no question, then, that "the *complaining party's* injury is likely to be redressed" by the award of statutory damages. *Sprint*, 554 U.S. at 302 (Roberts, C.J., dissenting).

An illustration proves the point. Robins could have sent Spokeo a demand letter as soon as his FCRA rights were violated. Had Spokeo agreed to the demand, the parties' settlement would have averted litigation and resolved Robins's FCRA claim. In contrast, the defendant in *Vermont* would have had no interest in responding to a demand letter from the *qui tam* relator because the relator lacked the authority to settle the government's False Claims Act action (at least before the initiation of litigation). *Vermont*, 529 U.S. at 769-70; Pet. Br. 31 n.5.

Accordingly, Robins's monetary interest is not "a 'byproduct' of the suit itself" or derived from any other "interest unrelated to injury in fact." *Vermont*, 529 U.S. at 772-73. Robins's statutory claim to damages under the FCRA derives from Spokeo's failure to comply with duties it owed to him and materialized the moment Spokeo disseminated false information about him.

The point is crucial. The plaintiff must "aver an injury peculiar to himself, as distinguished from the great body of his fellow citizens" to have Article III standing. *Lance*, 549 U.S. at 440 (citation and quotations omitted); *Warth*, 422 U.S. at 501 ("[T]he plaintiff still must allege a distinct and palpable injury to himself, even if it is an injury shared by a large class of other possible litigants."). Unlike a *qui tam* relator, Robins avers a statutory "injury to himself that is likely to be redressed by a favorable decision[.]" *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 38 (1976).

The fact that the statutory damages are liquidated is immaterial. At common law, courts did not require a plaintiff to allege independent consequential harm in order to bring a claim to recover contractual liquidated damages (even if certain jurisdictions require it in order to prevail on the merits). 2 Samuel Comyn, *A Treatise of the Law Relative to Contracts and Agreements Not Under Seal* 537-38 (1807). This Court has not hesitated to enforce contractual stipulations "without proof of the damages actually sustained." *United States v. Bethlehem Steel Co.*, 205 U.S. 105, 119 (1907). A contrary assertion would be "wrong in principle, was unknown to the common law, does not prevail in the courts of England at the present time, and it is not sanctioned by the decisions of this court." *Sun Printing & Publ'g Ass'n v. Moore*, 183 U.S. 642, 660 (1902).

Therefore, a federal court would not, for purposes of evaluating Article III standing, look behind a stipulation to determine if the breach caused consequential harm. The contractual claim to a stipulated sum is all that would be required. For example, a suit brought by A—who holds a mortgage on Blackacre—to recover $75,000.01 in stipulated damages because C, who lives in a different state, made a payment five minutes after the deadline established in the note would properly be in federal court. The plaintiff need not allege or prove that a payment late by five minutes caused consequential harm to establish Article III standing.

It would be wrong to arrive at a different outcome here. Robins alleged that Spokeo violated a legally protected right for which the remedy is a stipulated sum of money. The fact that his legal right derives from statute, rather than contract, makes no difference. *See Lujan*, 504

U.S. at 576. Both at common law and under Article III, it is the breach of a legal duty for which money is due that creates the necessary "personal stake"—not the source of the obligation.

Spokeo contends that this approach "would collapse" the "three-part test for Article III standing." Pet. Br. 39. That contention rings hollow. In the first place, it would be a mistake to consider "the elements of standing as separate strands rather than as interlocking and related elements meant to ensure a personal stake." *Sprint*, 554 U.S. at 302 (Roberts, C.J., dissenting). Even so, standing analysis is ordinarily "straightforward" when the case involves "economic or physical harms." *Hein*, 551 U.S. at 642 (Souter, J., dissenting). The particularized claim for damages based on the FCRA violation is "concrete and actual or imminent, not conjectural or hypothetical[;]" the claim (unlike most taxpayer suits, for instance) is "fairly traceable" to the FCRA violation; and the entitlement to damages ensures there is "a likelihood that the requested relief will redress the alleged injury." *Steel Co.*, 523 U.S. at 103 (quotations omitted). The three-part test is no more collapsed here than it is in any breach-of-contract action for liquidated damages.

Last, Spokeo incorrectly suggests, almost as an afterthought, that allowing for statutory damages to serve as Wallet Injury amounts to the collection of "public fines by private litigants." Pet. Br. 29. Foremost, this merits argument about the as-applied constitutionality of the statute, raised for the first time in Spokeo's opening brief in this Court, has no bearing on whether Robins has standing. *Cf. Laidlaw*, 528 U.S. at 197 (Kennedy, J., concurring).

In any event, statutory damages are not a public fine. Congress has long provided for statutory damages as "compensation, not a penalty or punishment," for losses that are "too obscure and difficult of proof for estimate other than by liquidated damages." *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 583-84 (1942). This case is thus far afield from one in which a plaintiff seeks to have the defendant held liable for damages payable only to the public fisc. *See Laidlaw*, 528 U.S. at 173; *id.* at 202 (Scalia, J., dissenting). The statutory damages available under the FCRA vindicate Robins's particular interest in Spokeo's use of proper procedures to ensure it generates an accurate credit report about him. This is not an action driven by an "injury to the interest in seeing that the law is obeyed." *FEC v. Akins*, 524 U.S. 11, 24 (1998).

III. The Fair Credit Reporting Act's Relationship To Common-Law Defamation Confirms That Robins Has Standing.

Because the deprivation of a personalized statutory right constitutes Article III injury, Congress need not ensure that *this* particular statutory right has common-law roots. Nevertheless, this Court has explained that while a common-law analog is not required, its existence can be "well nigh conclusive with respect" to Article III standing. *Vermont*, 529 U.S. at 777. The case can be decided on this basis without reaching broader issues.

A direct common-law analog exists here in the law of defamation. Long before the FCRA, a common-law defamation action could be brought against a credit reporting agency for disseminating false information. Maurer, *supra*, at 96; William T. Prosser, *Libel Per Quod*,

46 Va. L. Rev. 839, 842-43 (1960). Congress enacted the FCRA to build upon this established body of law by federalizing the interest and modifying it to overcome obstacles to recovery that had developed under state legal regimes. Maurer, *supra*, at 115. Hence, Robins's action follows directly from the common-law rules of defamation. Like the FCRA's allowance of statutory damages, those rules "for centuries have allowed juries to presume that some damage occurred from many defamatory utterances and publications." *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 760-61 (1985).

After the English Reformation, defamation, once the province of ecclesiastical or manorial officers, came within the common law's province. Van Vechten Veeder, *History and Theory of the Law of Defamation*, 3 Colum. L. Rev. 546, 549-69 (1903). But while courts increasingly heard such actions, some traditional restrictions remained. One key limitation was the requirement that the plaintiff prove a "temporal loss," or actual damages, arising from the defamation. *See, e.g., Bernard v. Beale*, (1617) 79 Eng. Rep. 1241 (K.B.). Even then, however, exceptions were made for claims from which harm was presumed even in the absence of evidence—including, notably, slander claims that "touch[ed] [the plaintiff] in his profession." *Jenkins v. Smith*, (1620) 79 Eng. Rep. 501 (K.B.).

But with the rise of the printing press and wider dissemination of written works, a legal distinction took root between written defamation (libel) and spoken defamation (slander). "As the English law developed, *all libel, of whatever kind*, was held to be actionable without proof of any damage; or, as it was sometimes stated, from any libel some damage was conclusively presumed."

Prosser, *Libel*, *supra*, at 842 (emphasis added); *see, e.g.*, *R v. Langley*, (1702) 90 Eng. Rep. 1261 (K.B.). By 1812, the distinction permitting recovery for *any* libel had "been recognized by the Courts for at least a century back." *Thorley v. Lord Kerry*, (1812) 128 Eng. Rep. 367 (K.B.).

These common-law rules—permitting courts to hear claims for all libel, or any defamation touching upon trade or business, without proof of consequential harm—were well known to the Framers. Blackstone noted, for example, that for certain categories of slander, including "scandalous words that ... may impair [a man's] trade ... an action on the case may be had, without proving any particular damage to have happened, but merely upon the probability that it might happen." Blackstone, *supra*, at *124; 2 Kent, Commentaries on American Law 16 (1827). Consequential harm was not needed because this kind of false statement "necessarily or naturally and presumptively causes pecuniary loss to the person of whom it is published." *Mitchell v. Bradstreet Co.*, 22 S.W. 358, 362 (Mo. 1893).

Early American decisions similarly demonstrate widespread acceptance of the established principle that general damages, without proof of consequential harm, were available in all cases of libel. *See, e.g.*, *Runkle v. Meyer*, 3 Yeates 518 (Pa. 1803); *McClurg v. Ross*, 5 Binn. 218 (Pa. 1812); *Norfolk & Wash. Steamboat Co. v. Davis*, 12 App. D.C. 306, 331-32 (D.C. Cir. 1898). American courts also adopted the English common-law rule that general damages were permissible for any statement that touched upon the trade or credit of those engaged in business. *See Hermann v. Bradstreet Co.*, 19 Mo. App. 227, 232 (1885); *Lansing v. Carpenter*, 9 Wis. 540, 542 (1859); *Newbold v.*

J.M. Bradstreet & Son, 57 Md. 38, 52-53 (1881); *Dun v. Maier*, 82 F. 169, 173 (5th Cir. 1897).

In sum, the legal tradition familiar to the Framers had long permitted claims by those who, like Robins, were the subject of false and defamatory reports, particularly reports that had the potential to harm their standing, credit, trade, or business. Such claims were cognizable absent "evidence of actual loss," *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974), because the "experience and judgment of history" is "'that proof of actual damage will be impossible in a great many [defamation] cases'" even though "'it is all but certain that serious harm has resulted in fact.'" *Greenmoss Builders*, 472 U.S. at 760 (1985) (quoting W. Prosser, Law of Torts § 112 (4th ed. 1971)). In this category of cases, "the existence of injury is presumed from the fact of publication." *Gertz*, 418 U.S. at 349.

Robins's claim fits neatly within this common-law tradition. He alleges that Spokeo disseminated a false written report that misrepresented his age, marital status, earnings history, employment circumstances, and physical appearance. Such information creates a substantial risk that his employment prospects will be negatively affected, and would "deter third persons from associating or dealing with him." Restatement (Second) of Torts § 559. Employers may decide not to pursue a candidate they believe is overqualified, has a high salary expectation, or may have family commitments preventing the candidate from accepting the relevant responsibilities. Nor may they be inclined to pursue candidates whose Spokeo-generated reports vary from the (accurate) information the applicant might himself provide the

employer.[6] Robins's claim thus would have been actionable at common law even assuming that Spokeo's dissemination of falsehoods were of "insignificant character" and there was "no proof that serious harm has resulted from the defendant's attack upon the plaintiff's character and reputation." Restatement (Second) of Torts § 620 cmt. a (1977).

Spokeo's efforts to downplay the connection between Robins's FCRA claim and common-law defamation fall short. After begrudgingly conceding, as it must, that no proof of "actual harm" was required in a number of broad categories of defamation, Pet. Br. 50-51, Spokeo still ignores the rule that "many things are actionable when written or printed and published which would not be actionable if merely spoken, without averring and proving special damage." *Pollard v. Lyon*, 91 U.S. 225, 228 (1875). Spokeo is left to argue that Robins cannot "satisfy the common law standard" for the recovery of general damages for defamatory statements. Pet. Br. 51-52. As explained, that is incorrect.

Even if this were true, however, it would not help Spokeo. The question, for purposes of Article III, is not whether Robins could have brought a successful claim for defamation in the late eighteenth century, but whether the statutory scheme permits an action "*of the sort* traditionally amenable to, and resolved by, the judicial process." *Steel Co.*, 523 U.S. at 102 (emphasis added). Like any legislature, Congress has considerable authority to

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6. Spokeo's misrepresentation of Robins's marital status also is inherently harmful, given that Spokeo itself promotes its service for use by prospective romantic partners. JA 38 n.12.

adjust the common law, including with respect to classes of misrepresentations that warrant some form of presumed damages. Congress is not so constrained that it may protect rights derived from the common law only if it accepts them in their fossilized form.

Indeed, this Court has long held that "[t]he judiciary clause of the Constitution ... did not crystallize into changeless form the procedure of 1789 as the only possible means for presenting a case or controversy otherwise cognizable by the federal courts." *Nashville, C. & St. L. Ry. Co. v. Wallace*, 288 U.S. 249, 264 (1933); *see Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 239-40 (1937) ("In dealing with methods within its sphere of remedial action the Congress may create and improve as well as abolish or restrict."). Congress has the power to update legal rights to the modern era, even if those statutory actions do not "have clear analogs in our common-law tradition." *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in the judgment).

The credit-reporting context illustrates why Congress must have the latitude to adjust the common law. The FCRA was enacted at a time when many states had extended a qualified privilege that served to insulate credit reporting agencies from any consequences of the "serious problem ... of inaccurate or misleading information." 115 Cong. Rec. 2414. As a result, credit reporting agencies lacked any incentive to ensure the accuracy and completeness of consumer data—even as the volume and uses of that data multiplied rapidly. Moreover, although harm was almost certain to occur from these erroneous reports, it was "very difficult to prove." Consumer Information, *supra*, at 6 (statement of John Brown). Without transparency,

consumers had no way to know whether their reports were accurate, let alone whether any falsehoods may have caused them to be passed over for a loan, a job, or some other benefit that society offers.

The FCRA was Congress's measured response. It provided consumers with important new rights to review and correct information maintained by the credit reporting agencies. It also included restrictions on the disclosure and use of information and mandated the implementation of reasonable procedures to ensure compliance with the law's requirements. *Supra* 4-6.

In exchange, Congress largely preempted the strict-liability scheme of defamation with a more forgiving negligence-based regime. *Id.* And while Congress created a civil action against credit reporting agencies, it limited the availability of punitive damages to egregious behavior. *Id.* In 1996, Congress made further adjustments to the FCRA—including the addition of the statutory damages provision at the center of this dispute, which it reasonably capped at $1,000 per violation. *Id.* In other words, whether or not the FCRA perfectly "duplicate[s] the recovery at common law" it provides "a reasonably just substitute for the common-law or state tort law remedies it" partially "replaces." *Duke Power Co. v. Carolina Envtl. Study Grp., Inc.*, 438 U.S. 59, 87-88 (1978); *see* Mayer, *supra*, at 115.

At base, the FCRA permits both an action (a claim for the wrongful dissemination of false information) and a remedy (presumed damages for harm that is difficult to identify or measure) that are "consonant with what was, generally speaking, the business of the Colonial courts

and the courts of Westminster when the Constitution was framed." *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 150 (1951) (Frankfurter, J., concurring). The Court can affirm on that basis alone.

IV. Spokeo's Standing Test Undermines, Rather Than Promotes, The Separation Of Powers.

Article III's standing requirement is built "on a single basic idea—the idea of separation of powers." *Allen v. Wright*, 468 U.S. 737, 752 (1984). But this lawsuit—a dispute between private parties—does not implicate separation-of-powers concerns. Rather, the inherently subjective Article III standing rule Spokeo asks this Court to adopt—in which courts can substitute their own normative views of what constitutes injury for Congress's—would actually undermine the separation-of-powers principles that have guided this Court for over two centuries.

The separation-of-powers principle undergirding Article III's injury requirement reflects a concern that the judiciary not "undertak[e] tasks assigned to the political branches." *Casey*, 518 U.S. at 349. The requirement that a litigant suffer a personalized injury ensures that courts respect the other branches' roles by not adjudicating generalized grievances shared by the entire populace. *Lujan*, 504 U.S. at 575. Generalized grievances require democratic solutions and must be resolved legislatively. *See* John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 Duke L.J. 1219, 1229-30 (1993). Limiting the federal judicial power to "controvers[ies] between parties which ha[ve] taken a shape for judicial decision" prevents courts from inserting themselves into "almost every

subject proper for legislative discussion and decision" or "on which the executive could act." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006) (quoting 4 Papers of John Marshall 95 (C. Cullen ed. 1984)). Moreover, concerns about the judiciary's proper place in our tripartite system are at their apex "'when reaching the merits of the dispute would force [the court] to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional.'" *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013) (quoting *Raines*, 521 U.S. at 819-20).

Those separation-of-powers concerns are not present here. Robins did not ask the district court to order a government agency to take, or to refrain from taking, any action. Nor does he challenge executive action or an act of Congress on constitutional grounds. Rather, Robins seeks nothing more than a traditional remedy for the "loss of [a] private right" protected by statute. *Raines*, 521 U.S. at 821. He has asked the federal court solely to determine that Spokeo—a private entity—created a false credit report about him in violation of the FCRA, to enjoin Spokeo from continuing to disseminate that false report, and to award him the statutory damages to which he is entitled for that violation. This is the very model of a case or controversy.

Spokeo's assertion that Article III separation-of-powers concerns arise in this private litigation are misguided. Pet. Br. 27-29. That would be true only if Robins were asserting a "generally available grievance" in which he is "claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large[.]"

Lujan, 504 U.S. at 573-74. But he is not. *See supra* 31-36. Consequently, Robins's FCRA lawsuit "does not ... require" federal courts "to participate in any legislative, administrative, political or other nonjudicial function[.]" *National Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 591 (1949) (plurality opinion).

Spokeo's novel position, in contrast, raises serious separation-of-powers concerns. Spokeo candidly asks this Court to override Congress's determination that the failure to follow reasonable procedures to assure maximum possible accuracy in the creation of credit reports causes concrete harm to the subjects of resulting inaccurate reports. Pet. Br. 38-39. Spokeo's position represents a sweeping and unsustainable conception of Article III.

The judgment as to whether a private interest warrants legal protection generally involves subjective, value-laden choices. In the main, such judgments are the essence of democratic lawmaking, and when Congress chooses to protect a particular interest, courts respect that choice. *See United States v. Oakland Cannabis Buyers' Co-op.*, 532 U.S. 483, 497 (2001) ("A district court cannot, for example, override Congress' policy choice, articulated in a statute, as to what behavior should be prohibited."). That is not to say that Congress *alone* has the power to define injuries. Following in the tradition of the common law, federal courts have the power to decide if a non-statutory interest is sufficiently concrete to invoke the judicial power. Indeed, that is what the Court did in *Hardin v. Kentucky Utilities Co.*, 390 U.S. 1 (1968), as to economic competition, and in *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205 (1972),

as to discrimination. *See Lujan*, 504 U.S. at 578. But that tradition does not license federal courts to substitute their normative judgment for Congress's when Congress has determined that a private interest warrants *statutory* protection.

Spokeo's conception of Article III results in a strange constitutional imbalance: Under Spokeo's view, Congress cannot decide for itself whether certain private interests (like those protected by the FCRA) warrant legal protection. Rather, only federal courts may determine which types of interests qualify as concrete. But neither the common law nor the Constitution grants federal courts the exclusive authority to deem such interests worthy of protection.

The same holds true for remedies. Courts have the power to fashion relief to ensure that constitutional and common-law harms can be remedied. But "the authority to fashion private remedies to enforce federal law belongs to Congress alone." *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2417 (2014) (Thomas, J., concurring in the judgment). When Congress creates remedies for individuals personally harmed by private conduct it considers injurious, it does so based on a collective judgment about how the wronged party should be compensated. The Court therefore leaves it to Congress, as it must, to decide whether to provide a remedy for the invasion of a statutory right and what that remedy should be. *Shepard v. NLRB*, 459 U.S. 344, 351 (1983) ("Congress is free to provide a damage remedy for some violations of federal law, and not for others.").

Far from promoting the proper division of authority between the three branches, then, Spokeo invites improper judicial second-guessing of Congress's quintessentially legislative finding that an individual consumer suffers an injury when a credit reporting agency fails to use reasonable procedures and thereby creates a false report about him, and that monetary damages appropriately remedy that injury. It is difficult to comprehend a greater incursion into Congress's authority than the one Spokeo proposes. Congress has granted statutory protection to Robins, has held Spokeo accountable to him in the form of statutory damages, and has provided a cause of action to adjudicate their private dispute in federal court. Contrary to Spokeo's protests, no separation-of-powers problem arises here unless the Court holds that Congress was without the authority to do so.

V. The Fair Credit Reporting Act Permits Recovery Of Statutory Damages For Willful Violations Without Proof Of Actual Damages.

In a last-ditch effort, Spokeo argues that the FCRA should be interpreted to require Robins to show actual damage before he may receive statutory damages. Pet. Br. 55-56. Spokeo rests this atextual construction of the statute on the doctrine of constitutional avoidance. But there are no difficult constitutional questions to avoid here. And even if there were, "constitutional avoidance is a tool for choosing between competing *plausible* interpretations of a provision." *Warger v. Shauers*, 135 S. Ct. 521, 529 (2014) (emphasis added). It is not a license to "distort[] plain statutory text in order to produce a 'more sensible' result." *INS v. St. Cyr*, 533 U.S. 289, 334 (2001) (Scalia, J., dissenting); *Bond*, 134 S. Ct. at 2094-97 (2014) (Scalia,

J., concurring in the judgment); *Pub. Citizen*, 491 U.S. at 481-82 (Kennedy, J., concurring in the judgment).

The FCRA's text could not be plainer. The statute provides that a credit reporting agency is liable to "any consumer" who is the subject of a willful violation "in an amount equal to the sum of ... any actual damages sustained by the consumer as a result of the failure *or* damages of not less than $100 and not more than $1,000[.]" 15 U.S.C. § 1681n (emphasis added). The "ordinary use" of the word "or" is "almost always disjunctive, that is, the words it connects are to be given separate meanings." *United States v. Woods*, 134 S. Ct. 557, 567 (2013) (citations and quotations omitted); *see* 1A Sutherland Statutes and Statutory Construction § 21:14 (7th ed. 2009) ("The use of the disjunctive usually indicates alternatives and requires that those alternatives be treated separately."). The FCRA's deliberate use of the disjunctive "or" is strong evidence that Congress did not consider "actual damages" a prerequisite to recovery of statutory damages for willful violations.

Here, the evidence is conclusive. Congress knew what it was doing. The impetus for this amendment was the difficulty of proving actual damages for statutory violations. *See supra* 5-6. To address this issue, Congress gave wronged consumers a choice between actual damages and statutory damages of between $100 and $1000 for willful violations. And for violations involving specified kinds of fraudulent activity, the consumer may recover "actual damages sustained ... *or* $1,000, *whichever is greater*." 15 U.S.C. § 1681n(a)(1)(b) (emphasis added). In other words, a consumer whose FCRA rights are willfully violated may elect actual *or* statutory damages, while only

"actual damages sustained by the consumer" are available for negligent violations. *Id.* § 1681o. The FCRA cannot be fairly interpreted to make recovery of statutory damages depend on proof of actual damages.

If Congress had wanted to make actual damages a gateway to statutory damages, it knew how to do so. *See, e.g.*, 5 U.S.C. § 552a(g)(4)(A) (providing that an individual subjected to "willful" violations of the Privacy Act may recover "actual damages ... but in no case shall a person entitled to recovery receive less than the sum of $1,000"). But Congress did not employ "the critical limiting phrase 'entitled to recovery'" that led to the interpretation of the Privacy Act that Spokeo asks the Court to shoehorn into the FCRA. *Doe v. Chao*, 540 U.S. 614, 626 (2004); *cf. FAA v. Cooper*, 132 S. Ct. 1441, 1454-55 (2012) ("Neither the FHA nor the FCRA contains text that precisely mirrors the Privacy Act. In neither of those statutes did Congress specifically decline to authorize recovery for general damages as it did in the Privacy Act.").

VI. Policy Objections To Class Actions Are Irrelevant To The Question Of Article III Standing.

Finally, Spokeo argues that the "practical effect" of class actions should factor into the Court's constitutional and statutory interpretation. Pet. Br. 32. Indeed, Spokeo and its supporting *amici* devote significant attention to all the problems they see with class-action litigation. But this line of argument is irrelevant to the meaning of Article III, which applies to all cases. Nor is it relevant to the proper interpretation of the FCRA. Neutral principles—not policy disputes—are the only solid footing for interpreting the Constitution and laws of the United States.

Those involved in class-action litigation obviously have strong disagreements about whether they should be curtailed or reformed. Spokeo and its *amici* argue that class actions are "used as cudgels in extracting massive windfall settlements." Pet. Br. 35. *Amici* supporting Robins surely will argue that class actions root out and stop unlawful practices that are harmful to the public, that settlement amounts are much lower than Spokeo suggests, *see, e.g.*, Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. of Empirical Legal Stud. 811, 828 (2010), and that the class-action settlement rate is similar to the rate for other civil litigation, *see, e.g.*, Charles Silver, *"We're Scared to Death": Class Certification and Blackmail*, 78 N.Y.U. L. Rev. 1357, 1399-1402 (2003). In other words, this is a classic policy dispute.

The fact that Spokeo thinks the Court would not only choose sides in this policy dispute, but would then allow whatever policy judgment it reached to pervade its legal reasoning, is disconcerting. The Court is in "no position to judge the comparative force of these policy arguments." *Microsoft Corp. v. i4i Ltd. P'ship*, 131 S. Ct. 2238, 2252 (2011). It does "not sit as a committee of review," nor is it "vested with the power of veto." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 194-95 (1978). The Court is tasked with deciding whether Robins has Article III standing to enforce legal rights he holds under the FCRA. "[T]he wisdom of Congress's judgment on this matter is not [the Court's] concern." *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2785 (2014). "This is no less true with respect to class actions than with respect to other suits." *Casey*, 518 U.S. at 357.

If Spokeo believes that the FCRA should be amended to require actual harm for willful violations, it should take the issue up with Congress.[7] But policy issues have no bearing on the meaning of the Constitution or this statute. "These are battles that should be fought among the political branches and the industry. Those parties should not seek to amend the statute by appeal to the Judicial Branch." *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 462 (2002).

7. Indeed, a pending bill would limit injuries in all federal class actions to "the alleged impact of the defendant's actions on the plaintiff's body or property." Fairness in Class Action Litigation Act, H.R. 1927, 114th Cong. (2015).

CONCLUSION

The Court should affirm the judgment below.

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REPLY BRIEF

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SPOKEO, INC.,

Petitioner,

v.

THOMAS ROBINS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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TABLE OF CONTENTS

Page

I. RESPONDENT CAN PREVAIL ONLY IF THE COURT ACCEPTS HIS ARGUMENT THAT VIRTUALLY EVERY STATUTORY VIOLATION QUALIFIES AS INJURY IN FACT. 1

II. THE CONSTITUTION'S INJURY-IN-FACT REQUIREMENT IS NOT SATISFIED BY A LEGAL VIOLATION UNACCOMPANIED BY CONCRETE HARM. 4

A. The Constitution's Common Law Context Demonstrates That Concrete Harm Is Essential For A Dispute To Qualify As A "Case" Or "Controversy." 5

B. Separation-Of-Powers Principles Limit The Judicial Power To Cases Of Concrete Harm. 8

C. This Court's Decisions Make Clear That Concrete Harm Is Injury In Fact's "Hard Floor." 11

1. A legal violation cannot substitute for concrete harm. 11

2. This Court has never found injury in fact in the absence of concrete harm. 13

D. Respondent Has Not Satisfied Article III's Concrete Harm Requirement. 15

1. The potential to recover statutory damages is not injury in fact. 15

2. The defamation analogy fails 18

3. The statutory violations do not otherwise satisfy the concrete harm requirement. 19

TABLE OF CONTENTS—continued

Page

III. THE FCRA SHOULD NOT BE CONSTRUED TO PERMIT SUITS WITHOUT PROOF OF CONCRETE HARM.....23

CONCLUSION.....25

TABLE OF AUTHORITIES

Page(s)

CASES

Arizona Christian Sch. Tuition Org. v. *Winn*,
131 S. Ct. 1436 (2011) 9

Ass'n of Data Processing Serv. Orgs., Inc. v. *Camp*,
397 U.S. 150 (1970) 11

Board of Regents of State Colls. v. *Roth*,
408 U.S. 564 (1972) 19, 20

Carey v. *Piphus*,
435 U.S. 247 (1978) 14, 15, 18, 20

Coleman v. *Miller*,
307 U.S. 433 (1939) 7

College Sav. Bank v. *Florida Prepaid Postsecondary Educ. Expense Bd.*,
527 U.S. 666 (1999) 20

Consumer Watchdog v. *Wisconsin Alumni Research Found.*,
753 F.3d 1258 (Fed. Cir. 2014) 6

Crittal v. *Horner*,
Hobart 219, 80 Eng. Rep. 366 (K.B. 1618) 18

Dalton v. *Capital Associated Indus., Inc.*,
257 F.3d 409 (4th Cir. 2001) 3

DeAndrade v. *Trans Union LLC*,
523 F.3d 61 (1st Cir. 2008) 3

Habitat Educ. Ctr. v. *U.S. Forest Serv.*,
607 F.3d 453 (7th Cir. 2010) 5

TABLE OF AUTHORITIES—continued

Page(s)

Havens Realty Corp. v. *Coleman*,
455 U.S. 363 (1982) 13, 14

Hunt v. *Dowman*,
Cro. Jac. 478, 79 Eng. Rep. 407
(K.B. 1617) 6

I. de S. & Wife v. *W. de S., Y.B. Liber Assisarum*,
22 Edw. 3, f. 99, pl. 60 (1348 or 1349) 6

Keech v. *Sandford*,
Sel. Cas. T. King 61, 25 Eng.
Rep. 223 (Ch. 1726) 7

Koropoulos v. *Credit Bureau, Inc.*,
734 F.2d 37 (D.C. Cir. 1984) 3

Lexmark Int'l, Inc. v. *Static Control Components, Inc.*,
134 S. Ct. 1377 (2014) 15

Lujan v. *Defenders of Wildlife*,
504 U.S. 555 (1992) 11, 12, 17, 23

Marzetti v. *Williams*,
1 B. & Ad. 415, 109 Eng. Rep. 842
(K.B. 1830) 7

Massachusetts v. *EPA*,
549 U.S. 497 (2007) 12

McClurg v. *Ross*,
5 Binn. 218 (Pa. 1812) 18

Memphis Cnty. Sch. Dist. v. *Stachura*,
477 U.S. 299 (1986) 13

New York v. *United States*,
505 U.S. 144 (1992) 10

TABLE OF AUTHORITIES—continued

Page(s)

Northeastern Florida Chapter of the Associated General Contractors of America v. *City of Jacksonville*, 508 U.S. 656 (1993) 13

Public Citizen v. *Department of Justice*, 491 U.S. 440 (1989) 14

Robert Marys's Case, 9 Co. Rep. 110b, 77 Eng. Rep. 895 5

Runkle v. *Meyer*, 3 Yeates 518 (Pa. 1803) 18

Sprint Commc'ns Co. v. *APCC Servs., Inc.*, 554 U.S. 269 (2008) 7, 15

Steel Co. v. *Citizens for a Better Env't*, 523 U.S. 83 (1998) 14, 15, 16

Stone v. *White*, 301 U.S. 532 (1937) 8

Tarnowski v. *Resop*, 51 N.W.2d 801 (Minn. 1952) 8

Town of Castle Rock v. *Gonzales*, 545 U.S. 748 (2005) 20

Vermont Agency of Natural Res. v. *United States ex rel. Stevens*, 529 U.S. 765 (2000) 16, 17

Washington v. *CSC Credit Servs. Inc.*, 199 F.3d 263 (5th Cir. 2000) 3

Watkins v. *Home Dep't*, [2006] UKHL 17, 2006 WL 755484 (H.L. 2006) 7

TABLE OF AUTHORITIES—continued

Page(s)

CONSTITUTION, STATUTES, REGULATIONS, AND RULES

U.S. CONST. art. III, § 2 ..... *passim*

Fair Credit Reporting Act

15 U.S.C. § 1681b(b)(1) 2

15 U.S.C. § 1681e 22

15 U.S.C. § 1681e(b) 3, 4

15 U.S.C. § 1681e(d) 1

15 U.S.C. § 1681j(a)(1)(c) 2

15 U.S.C. § 1681n 2

15 U.S.C. § 1681n(a)(1) 2, 24

35 U.S.C. § 311 6

Consumer Credit Reporting Reform Act of 1996, Pub. L. No. 104-208, Div. A, tit. II, § 2412(b), 110 Stat. 3009-446 (1996) 22

Fair Credit Reporting Act, Pub. L. No. 91-508, § 616, 84 Stat. 1127, 1134 (1970) 22

12 C.F.R. § 1022.136 2

Fed. R. Civ. P. 23(b)(3) 4

MISCELLANEOUS

WM. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (1st ed. 1768) 6, 7, 19

JAMES KENT, COMMENTARIES ON AMERICAN LAW (1827) 18

TABLE OF AUTHORITIES—continued

Page(s)

RESTATEMENT (FIRST) OF TORTS § 7 (1934) 6

RESTATEMENT (FIRST) OF RESTITUTION § 1 (1937) 8

John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 Duke L.J. 1219 (1993) 10, 14

Antonin Scalia, *The Doctrine Of Standing As An Essential Element Of The Separation Of Powers*, 17 Suffolk U. L. Rev. 881 (1983) 12

REPLY BRIEF FOR PETITIONER[1]

I. RESPONDENT CAN PREVAIL ONLY IF THE COURT ACCEPTS HIS ARGUMENT THAT VIRTUALLY EVERY STATUTORY VIOLATION QUALIFIES AS INJURY IN FACT.

Respondent and his amici broadly assert that every violation of a statute constitutes injury in fact, even if the plaintiff suffers no adverse effects from the conduct constituting the violation; the only limitations are that the violation must be "personal" to the plaintiff and not "abstract." But their defense of the judgment below rests almost entirely on the narrower contention that, in enacting the Fair Credit Reporting Act (FCRA), Congress "sought to vindicate" the "harm individuals suffer from the dissemination of false credit reports created with inadequate procedures." Resp. Br. 12; see also U.S. Br. 28.

The flaw in that defense is that at least three—and perhaps all four—of respondent's claims do not require proof that the defendant disseminated false information. The judgment below therefore must be reversed unless this Court accepts respondent's broad argument that any statutory violation with any connection to a plaintiff satisfies the injury-in-fact requirement.

First, respondent alleges that petitioner violated the FCRA by failing to:

- give certain notices to providers and users of information (15 U.S.C. § 1681e(d));

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[1] The Rule 29.6 Statement in the opening brief remains accurate.

- ensure that users of information for employment purposes complied with statutory disclosure obligations (*id.* § 1681b(b)(1)); and
- provide a toll-free number for requesting annual reports (*id.* § 1681j(a)(1)(c); 12 C.F.R. § 1022.136).

Pet. Br. 5.

Disseminating false information is not an element of these violations. Nor is proof of falsity required by the provisions creating the private cause of action (15 U.S.C. § 1681n) or authorizing statutory damages (*id.* § 1681n(a)(1)).

Both parties agreed at the certiorari stage that these claims "remain in the case as it comes to this Court." Opp. 9; see Pet. Reply 6.

The government, by contrast, maintained that these claims were not properly before the Court, and contended that review should be denied or the question limited to whether false information constitutes injury in fact. U.S. Cert. Am. Br. 15-19 & n.4. Petitioner explained the errors in the government's analysis (Pet. Cert. Supp. Br. 3-5), and this Court granted review without altering the question presented.

Apparently lacking confidence in their broad argument that any statutory violation by itself satisfies Article III, the government (Br. 31-32)—now joined by respondent (Br. 33 n.5)—asserts that respondent's standing to litigate these claims is not before the Court.

That is wrong: the court of appeals' holding that respondent may litigate these three claims is part of the judgment under review. Indeed, a virtue of this

case is that it squarely presents respondent's broad contention for resolution by this Court.

Second, even respondent's remaining claim—the one on which he and the government focus—may not require proof that petitioner disseminated false information. The provision states only that an entity subject to the FCRA "shall follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual." 15 U.S.C. § 1681e(b).

Some courts of appeals have held—in the context of claims for actual, not statutory, damages—that falsity, or an allegation "tending to show" falsity, is necessary to establish a violation of Section 1681e(b). *Dalton* v. *Capital Associated Indus., Inc.*, 257 F.3d 409, 415 (4th Cir. 2001); see also, *e.g.*, *DeAndrade* v. *Trans Union LLC*, 523 F.3d 61, 66 (1st Cir. 2008); *Washington* v. *CSC Credit Servs. Inc.*, 199 F.3d 263, 267 n.3 (5th Cir. 2000). The D.C. Circuit has suggested that this falsity element might be grounded in the actual damages requirement. *Koropoulos* v. *Credit Bureau, Inc.*, 734 F.2d 37, 39 (D.C. Cir. 1984).

Respondent and the government contend here that Congress in the FCRA determined that concrete harm results from the dissemination of any false information. They therefore bear the burden of demonstrating that Congress in fact made that determination.

But they carefully avoid stating that falsity is an element of respondent's Section 1681e(b) statutory damages claim. They merely repeat respondent's al-

legation that the information about him was false. *E.g.*, Resp. Br. 8-9, 12-13, 44-45; U.S. Br. 4, 8-9, 29.[2]

If Section 1681e(b) does not target dissemination of false information, Congress did not make the determination on which respondent and the government rely. Respondent's standing then must rest (as the opinion below rested) on his broad argument that violation of any statutory standard constitutes Article III injury in fact.

II. THE CONSTITUTION'S INJURY-IN-FACT REQUIREMENT IS NOT SATISFIED BY A LEGAL VIOLATION UNACCOMPANIED BY CONCRETE HARM.

A plaintiff must demonstrate concrete harm—what this Court has described as a "palpable," nonabstract injury—to satisfy Article III's injury-in-fact requirement. That can take the form of pecuniary loss *or* nonpecuniary injuries that are concrete, such as loss of enjoyment of public resources and discriminatory treatment. Pet. Br. 37.

Respondent and his amici mischaracterize our position by asserting that we advocate a "consequential harm" test. *E.g.*, Resp. Br. 10-13; U.S Br. 21, 28-29. Their use of the label "consequential" falsely suggests that concrete harm requires proof of consequential damages—*i.e.*, indirect monetary loss. It does not.

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[2] This was not an oversight by respondent. His proposed class definition does not mention false information, requiring only that "information relating to" class members was "compiled and displayed by" petitioner. J.A. 15. That is because falsity is an individualized issue that could preclude class certification under Federal Rule of Civil Procedure 23(b)(3)'s predominance requirement.

The choice here is between respondent's standard requiring only the violation of a "personal" statutory right, without any palpable harm to the plaintiff; and requiring palpable harm. Only the latter approach accords with history, separation-of-powers principles, and precedent.

A. The Constitution's Common Law Context Demonstrates That Concrete Harm Is Essential For A Dispute To Qualify As A "Case" Or "Controversy."

Respondent and his amici insist that Blackstone and the Framers understood judicial power to reach any harmless infringement of an individual's right.

If that were true, one would expect numerous examples of adjudicated disputes in which the claimant suffered no palpable harm. But respondent and his amici rely instead on broad statements wrenched from their factual context—the shibboleth that "every legal wrong has a remedy" and similar statements. See Resp. Br. 19-20. "[T]o say such things," however, is merely "to talk in a circle" (*Habitat Educ. Ctr.* v. *U.S. Forest Serv.*, 607 F.3d 453, 460 (7th Cir. 2010) (Posner, J.)), because the "legal wrongs" familiar to Blackstone and his contemporaries each involved infliction of concrete harm. Pet. Br. 22-23.

Respondent particularly relies on property cases. But physical encroachment upon real property infringes the owner's right to exclude by effecting a *physical* invasion.[3] Intrusions upon intellectual prop-

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[3] Thus a lord did not need to demonstrate economic harm beyond the invasion of the common in which he held a property interest. See, *e.g.*, *Robert Marys's Case*, 9 Co. Rep. 110b, 77 Eng. Rep. 895 (K.B. 1613).

erty rights similarly inflict real-world harm—the claimant's works are copied or otherwise appropriated—and are actionable for the same reason.[4] Related claims, such as the improper exclusion of an individual from land, also require real-world harm to the claimant. *E.g.*, *Hunt* v. *Dowman*, Cro. Jac. 478, 79 Eng. Rep. 407, 408 (K.B. 1617) (permitting suit by lessor when lessee would not "suffer him to enter" and inspect for waste).

Thus, while these common law actions involve the "invasion of a legally protected interest" (RESTATEMENT (FIRST) OF TORTS § 7 cmt. a (1934)), they all are undergirded by palpable harm. See also pages 19-20, *infra*.

Respondent misreads Blackstone to suggest that a concrete-harm requirement would bar actions for assault and battery. Resp. Br. 17. Assault is actionable because it inflicts palpable harm by causing the victim to suffer fear of imminent battery, even though no actual touching occurs. See 3 WM. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *120 (1st ed. 1768); see also *I. de S. & Wife* v. *W. de S.*, *Y.B. Liber Assisarum*, 22 Edw. 3, f. 99, pl. 60 (1348 or 1349) (finding "harm" in the absence of physical contact). As to battery, "[t]he least touching of another's person willfully, or in anger, is a battery; for the law cannot draw the line between different degrees of violence * * * every man's person being sa-

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[4] Congress has made administrative patent review procedures available to individuals who would lack standing to challenge a patent in court. Pub. Knowledge Br. 7-9 (discussing 35 U.S.C. § 311). But that statutory right does not confer Article III standing to seek judicial review. *Consumer Watchdog* v. *Wisconsin Alumni Research Found.*, 753 F.3d 1258 (Fed. Cir. 2014), cert. denied, 135 S. Ct. 1401 (2015).

cred, and no other having a right to meddle with it, in any the slightest manner." 3 BLACKSTONE at *120. Each cause of action requires a palpable, concrete harm.

Nor does respondent's erroneous account find support in *Ashby* v. *White*. "[P]rivate damage" is "the clue" to that case. *Coleman* v. *Miller*, 307 U.S. 433, 469 (1939) (opinion of Frankfurter, J.). As the House of Lords recently reiterated, the legal analysis in *Ashby* turned on the infringement of a property right: treating the right to vote "as a matter of property" was "fundamental to Holt CJ's judgment and to his defence of the jurisdiction of the court." *Watkins* v. *Home Dep't*, [2006] UKHL 17 ¶ 55, 2006 WL 755484 (H.L. 2006). It thus was "relatively easy to conclude" that infringement upon that property interest was actionable. *Ibid.*

The other causes of action cited by respondent (at 19) and amici similarly involve palpable harm accompanying the violation of property rights. A "contractual right" is "an interest in property not immediately reducible to possession" (*Sprint Commc'ns Co.* v. *APCC Servs., Inc.*, 554 U.S. 269, 275 (2008)); its breach inflicts palpable harm by depriving the injured party of the benefit that he bargained for in exchange for valuable consideration that he gave up (and perhaps already provided). See, *e.g.*, *Marzetti* v. *Williams*, 1 B. & Ad. 415, 424, 109 Eng. Rep. 842, 845 (K.B. 1830) (permitting suit where "contract was broken"). Breaches of fiduciary duty similarly destroy the trust—something of value—to which the plaintiff was entitled by virtue of the pre-existing fiduciary relationship, which transferred to the fiduciary control over the plaintiff's property and ability to act for himself. See, *e.g.*, *Keech* v. *Sandford*, Sel. Cas.

T. King 61, 25 Eng. Rep. 223 (Ch. 1726). Such breaches inflict harm by sacrificing the value provided in exchange for that obligation of trust, even absent further economic loss—without regard to whether the claim alleges insider trading, kickbacks, or stolen business opportunities. See, *e.g.*, *Tarnowski* v. *Resop*, 51 N.W.2d 801, 803 (Minn. 1952).

The law of unjust enrichment also rests on harm to the plaintiff from the misuse of his property. See RESTATEMENT (FIRST) OF RESTITUTION § 1 (1937) ("A person who has been unjustly enriched *at the expense of another* is required to make restitution to the other.") (emphasis added); *id.* cmt. e (restitution may be available when a defendant "wrongfully disposes of the property of another" even if plaintiff suffered no economic loss); accord *Stone* v. *White*, 301 U.S. 532, 534 (1937). Whether a court ultimately chooses to quantify a remedy based on a defendant's gain—rather than a plaintiff's loss—is beside the point: the plaintiff still must have suffered a palpable, nonabstract harm.[5]

B. Separation-Of-Powers Principles Limit The Judicial Power To Cases Of Concrete Harm.

Respondent and the government have no substantive response to our demonstration that the concrete harm requirement vindicates separation-of-powers principles—and thus protects individual liberty—by restraining Congress from deputizing private citizens to undertake functions that Article II

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[5] The Restitution Scholars ignore the palpable harm associated with the claims they discuss, such as how copyright infringement reduces the value to the author of the right to license the work. See Br. 13-14.

assigns to the Executive. They state only that respondent is not asserting a generalized grievance because he claims a violation "of his *own* statutory rights." U.S. Br. 29; see Pub. Citizen Br. 32-33.

But that purported distinction rings hollow if respondent, like the government, were excused from the obligation to demonstrate palpable harm. Pet. Br. 27-32. Congress then could assign law-enforcement authority to private parties simply by conferring a right to sue whenever a statutory violation bears any connection to the plaintiff.

Indeed, respondent's position defies reality when, as here and in virtually all similar lawsuits, the plaintiff seeks to represent a class of millions of people, none of whom have suffered concrete harm. Respondent, for example, seeks certification of a class composed of every single person about whom Spokeo disseminated information over a ten-year period. See page 4, note 2, *supra*; Pet. Br. 32-35.[6] A lawsuit seeking to impose a statutory penalty for alleged market-wide violations without proving concrete harm is indistinguishable from a government enforcement action.

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[6] Respondent is flat wrong in asserting (Br. 54-56) that our argument turns on "policy objections" to class actions. The "no palpable harm" standard combined with the real-world effect of the class action device endows private parties with the functional equivalent of the Executive's law enforcement authority. "[C]ourts must be more careful to insist on the formal rules of standing, not less so," in this "era of frequent litigation [and] class actions." *Arizona Christian Sch. Tuition Org.* v. *Winn*, 131 S. Ct. 1436, 1449 (2011).

Nor does it matter whether the Executive acquiesces in the delegation of its law-enforcement responsibilities to private parties. U.S. Br. 29-30. "The Constitution's division of power among the three branches is violated where one branch invades the territory of another, whether or not the encroached-upon branch approves the encroachment." *New York* v. *United States*, 505 U.S. 144, 182 (1992). That is because the structural interests undergirding separation-of-powers principles secure the liberty of the citizenry. Pet. Br. 31-32.

Rather than rebut this showing, respondent counters with his own separation-of-powers argument: that this Court's enforcement of Article III's concrete harm requirement would usurp congressional authority. Resp. Br. 50-52.

That contention relies on an insupportably broad view of Congress's law-making authority. Respondent says that federal courts cannot "substitute their normative judgment for Congress's when Congress has determined that a private interest warrants *statutory* protection." *Id.* at 51. But the question here is not whether Congress may impose a statutory obligation. The question is whether a private party may enforce that obligation in federal court in the absence of concrete harm from the claimed violation. The answer turns on the meaning of Article III. After all, Congress is "not supreme in our system of government—the Constitution is." John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 Duke L.J. 1219, 1229 (1993).

Indeed, respondent's argument proves too much. It would allow Congress to determine that its purposes would be served best by conferring on *any* individual the right to sue for all violations. But re-

spondent elsewhere concedes that the Article III requirement of harm particularized to the plaintiff limits Congress's authority—and he cannot explain why Congress cannot supersede that requirement but may supersede Article III's companion concrete harm requirement.

C. This Court's Decisions Make Clear That Concrete Harm Is Injury In Fact's "Hard Floor."

No decision of this Court holds—or even hints—that Congress may override the injury-in-fact requirement by authorizing suit for statutory violations not accompanied by concrete harm.[7]

1. A legal violation cannot substitute for concrete harm.

Respondent and his amici would remove concrete harm from the standing inquiry by treating every personal connection to a statutory violation as *per se* injury in fact. They rely heavily on this Court's description of injury in fact as "an invasion of a legally protected interest" (*e.g.*, Resp. Br. 25 (quoting *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992))), but that assumes away the question presented here: Whether violation of a statutory requirement that is not alleged to have caused concrete harm implicates

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[7] The government contends that the injury-in-fact requirement as originally articulated was intended to expand the scope of standing. U.S. Br. 16-18. But any expansion reinforced the established principle that only *injured* parties may sue—by permitting suit based on "economic or other[]" concrete real-world injury (*Ass'n of Data Processing Serv. Orgs., Inc.* v. *Camp*, 397 U.S. 150, 152 (1970))—and in no way authorized suit by persons lacking the factual injury that this Court's precedents require.

a "legally protected interest"—or amounts to "an invasion" of it—in the first place.

Their sleight-of-hand switches out Article III's requirement that "'the party bringing suit must show that the action *injures* him in a concrete and personal way'" (*Massachusetts* v. *EPA*, 549 U.S. 497, 517 (2007) (emphasis added) (quoting *Lujan*, 504 U.S. at 581 (Kennedy, J., concurring))), and replaces it with a requirement that the plaintiff merely show that the challenged conduct is *connected* to him personally.

But *Lujan* made clear that the mere creation of a "self-contained" cause of action does *not* suffice to establish standing; rather, a plaintiff must have "a separate concrete interest" that has been impaired by the challenged conduct and that the lawsuit would redress. *Lujan*, 504 U.S. at 572. Congress may "elevat[e] to the status of legally cognizable injuries" only "concrete, *de facto* injuries that were previously inadequate in law." *Id.* at 578.[8]

Respondent and the government pluck phrases from this Court's opinions finding standing to assert "legally recognized" interests. See Resp. Br. 26-30; U.S. Br. 12-15. In each case, however, the plaintiff suffered concrete harm; there were no naked viola-

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[8] These actions—not eliminating the concrete harm requirement—are the ways that standing's "existence in a given case is largely within the control of Congress." Antonin Scalia, *The Doctrine Of Standing As An Essential Element Of The Separation Of Powers*, 17 Suffolk U. L. Rev. 881, 885 (1983). See also *ibid.* (there is "a minimum requirement of injury in fact which not even Congress can eliminate").

tions of statutory requirements. See Pet. Br. 40-46; pages 13-15, *infra*.[9]

If a plaintiff has suffered concrete harm, moreover, Congress has broad latitude to set as a remedy liquidated statutory damages that "roughly approximate the harm that the plaintiff suffered" from the violation—because "ordinary compensatory damages" are too difficult to quantify. *Memphis Cnty. Sch. Dist.* v. *Stachura*, 477 U.S. 299, 310-11 (1986); see also Pet. Br. 48-49 (discussing Copyright Act).

2. This Court has never found injury in fact in the absence of concrete harm.

Recognizing that Article III imposes a minimum concrete harm requirement that Congress may not override does not contravene any of this Court's precedents.

Respondent concedes that the plaintiff in *Havens Realty Corp.* v. *Coleman*, 455 U.S. 363 (1982), suffered the harm of discrimination, but claims that the Court did not decide the case on the basis of that harm. Resp. Br. 28; see also U.S. Br. 14 n.2. Not so. As the Court explained, Congress "banned *discriminatory* representations in § 804(d)" of the Fair Housing Act (*Havens*, 455 U.S. at 374 (emphasis added)), and being exposed to such discrimination is how "[a] tester who has been the object of a misrepresentation made unlawful under § 804(d) has suffered injury in

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[9] The same was true in *Northeastern Florida Chapter of the Associated General Contractors of America* v. *City of Jacksonville*, 508 U.S. 656 (1993), which involved minority preferences in municipal contract bidding and stands for the unremarkable proposition that the "denial of equal treatment" due to discrimination is itself an "injury in fact." *Id.* at 666.

precisely the form the statute was intended to guard against" (*id.* at 373-74).

Public Citizen v. *Department of Justice*, 491 U.S. 440 (1989), likewise does not support respondent, for at least two reasons. *First*, while the interest in compelling *governmental* disclosure of information at issue in that case stems from a long historical tradition of mandamus actions, no common-law analog permits one private party to compel disclosure from another. Cf. *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 105 (1998) (noting, in private dispute, unresolved question "whether being deprived of information that is supposed to be disclosed" by statute "is a concrete injury in fact that satisfies Article III").

Second, even if the kind of injury at issue in *Public Citizen* or in Freedom of Information Act cases were relevant in suits between private parties, the requirements that a plaintiff make the specific request for information *and* that the request be denied before invoking the judicial power ameliorate the concerns that attend private enforcement of bare statutory violations. "Another individual who has not made a disclosure request, and therefore has not suffered a wrongful denial, has not been injured and does not have standing to sue, even if he would like to have access to the same documents." Roberts, *supra*, 42 Duke L.J. at 1228 n.60 (discussing *Public Citizen*).

Respondent contends that our position is inconsistent with *Carey* v. *Piphus*, 435 U.S. 247, 266 (1978), where this Court held that nominal damages are available to vindicate procedural due process protections for educational benefits. Resp. Br. 22, 24. But, in *Carey*, nominal damages were available because the underlying allegations, which asserted the

improper suspension of the plaintiffs from school, plainly involved a concrete harm to the plaintiffs' "significant property interest" (435 U.S. at 266 (quotation marks omitted)) in the educational benefits guaranteed to them by law. Pet. Br. 46 n.9.[10]

D. Respondent Has Not Satisfied Article III's Concrete Harm Requirement.

Article III requires that a plaintiff suffer palpable, nonabstract harm analogous to the types of injury that the Court and the common law recognize as sufficient to establish a justiciable case or controversy. None of respondent's claims satisfy that standard.[11]

1. *The potential to recover statutory damages is not injury in fact.*

Respondent, but not the government, asserts that attaching a monetary bounty to proof of a statutory violation creates a "Wallet Injury" that satisfies Article III. Resp. Br. 36-41.

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[10] The government's extended discussion (Br. 15-16) of the *Zivotofsky* decisions is bizarre. The Court has "often said that dri[illegible] by jurisdictional rulings * * * have no precedential effect." *Steel Co.*, 523 U.S. at 91. And that is especially so where the defendant—the government—had no interest in disputing the plaintiff's standing because it endorsed (in *First American*) the broad "injury in law" principle applied by the court of appeals.

[11] Some amici contend that standing requirements should not apply when one private party sues another. *E.g.*, Am. Ass'n for Justice Br. 21-26; Pub. Law Profs. Br. 23-26, 32. But this Court consistently applies standing principles in such suits. *E.g.*, *Lexmark Int'l, Inc.* v. *Static Control Components, Inc.*, 134 S. Ct. 1377, 1386 (2014); *Sprint*, 554 U.S. at 273-75; *Steel Co.*, 523 U.S. at 102-10.

A statutory damages bounty may give a plaintiff a "concrete private interest" in the outcome of a suit, but that interest is "insufficient to give a plaintiff standing" because it is nothing more than "a wager upon the outcome" of the lawsuit and therefore "unrelated to injury in fact." *Vermont Agency of Natural Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 772 (2000); Pet. Br. 47.

Respondent tries to circumvent this holding by asserting that his claim differs from the *qui tam* action in *Vermont Agency* because "his own legally protected right" was violated. On respondent's view, the claim for payment of the statutory damages supplies the missing concrete harm. Resp. Br. 37-38.

First, this Court has never held that a claimed entitlement to a statutory bounty upon succeeding in a lawsuit can by itself constitute the concrete harm needed to establish standing to bring suit in the first place. The remedy may establish redressability (see *Steel Co.*, 523 U.S. at 103), but cannot satisfy the requirement of concrete harm resulting from the underlying statutory violation.

If the rule were otherwise, the concrete harm requirement could be eliminated by providing for statutory damages for every substantive violation, including respondent's claims for lack of notice to third parties and failure to provide a toll-free telephone number.

Respondent says requiring a violation of "his" statutory rights will limit the impact of this new principle. But the Article III requirement that the injury be personal is an additional limitation, not a substitute for concrete harm. Because Article III requires a plaintiff to allege some kind of palpable

harm independent of the statutory violation, the "concrete private interest" in the outcome of his lawsuit conferred by a statutory damages remedy is "unrelated to injury in fact." *Vermont Agency*, 529 U.S. at 772.

In addition, respondent's claimed limitation is largely illusory. If any "personal" interest is enough, nothing would stop Congress from giving any individual the "personal right" to sue to enforce the good conduct of others. But see *Lujan*, 504 U.S. at 578.

The breadth of respondent's view of "personal" is demonstrated by his apparent view that Congress has conferred upon every individual about whom a consumer reporting agency processes information the "personal" right to a 1-800 number on its website regardless of whether its absence had any concrete effect on him. See page 2, *supra*.

Second, respondent's analogy to contract rights (Br. 39) is deeply flawed. A contract is a bargained-for exchange, and failure to comply with a contractual obligation deprives the plaintiff of the value received for the consideration he gave up—and therefore in every case inflicts concrete harm. That is why a contract is enforceable and a gratuitous unilateral promise is not.

Indeed, a contract provision awarding liquidated damages for the defendant's violation of the rights of a third party would be enforceable in court (if supported by consideration, causing concrete harm); but even respondent recognizes that Congress could not accomplish that result by enacting a statute. Resp.

Br. 24. (The government's contract analogy (Br. 23) is flawed for the same reason.)[12]

2. The defamation analogy fails.

Respondent and his amici invoke common law defamation principles to try to salvage one of the claims. (As discussed above, at 1-4, the analogy does not apply to at least three claims and may not apply to any.)

No action lies for defamation (written or spoken, per se or otherwise) unless the challenged statement harms the plaintiff's reputation. *E.g.*, *Runkle* v. *Meyer*, 3 Yeates 518, 519 (Pa. 1803) (statements must "render a man ridiculous, or throw contumely on him" to be actionable); 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 13 (1827) (statements must "tend[] [to] * * * expose him to public hatred, contempt, or ridicule").

American law has consistently limited presumed damages to specific kinds of statements that, on their face, were "virtually certain to cause serious injury to reputation." *Carey*, 435 U.S. at 262. These include words containing "a plain imputation of some crime liable to punishment," or accusing the plaintiff of something that made him categorically unfit for his office or trade. *McClurg* v. *Ross*, 5 Binn. 218, 219 (Pa. 1812) (emphasis omitted). Respondent's cases confirm this point. See *Crittal* v. *Horner*, Hobart 219, 80 Eng. Rep. 366, 366-67 (K.B. 1618) (statement that

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[12] Our argument that this approach would constitute collection of public fines by private litigants is properly before the Court. That argument explains that a rule permitting bounty-based standing would violate settled separation-of-powers principles. Pet. Br. 29.

man contracted the "French pox" (syphilis) and passed it to his wife was actionable due to "odiousness of the infection").

Contrary to respondent's suggestion (Br. 43), Blackstone confirms that only accusations that "will of course be injurious" (3 BLACKSTONE at *124)—of crime, of infectious disease, or of conduct that would automatically disqualify the subject from a "trade or livelihood, as to call a tradesman a bankrupt, a physician a quack, or a lawyer a knave"—are actionable without proof of special damage. *Id.* at *123.

Any other words, even if derogatory, are actionable only if they "in fact" have "injurious effects." *Id.* at *124. Errors about facially neutral biographical details, such as marital status or education do not "upon the face of them" import an injury and thus do not support presumed damages. *Ibid.*

3. The statutory violations do not otherwise satisfy the concrete harm requirement.

Congress, of course, is not limited to the precise concrete harms recognized at common law. But the real-world impact on respondent here falls far short of what would be required to satisfy Article III.

First, Congress in the FCRA did not grant to each individual property rights associated with the dissemination of their personal information equivalent to the contract rights and intellectual property rights eligible for protection under the Takings Clause or Due Process Clause.

Certainly, the enactment of a statutory standard for third-party conduct combined with a cause of action for its violation does not in every case create a property right. Property rights attach to legal "rules

or understandings that secure certain benefits." *Board of Regents of State Colls.* v. *Roth*, 408 U.S. 564, 577 (1972). The bare right to sue, by contrast, is "an entitlement to nothing but procedure." *Town of Castle Rock* v. *Gonzales*, 545 U.S. 748, 764 (2005) (rejecting asserted entitlement to enforcement of restraining order). The right rejected in *Gonzales* did not "resemble any traditional conception of property" (*id.* at 766), and would have stretched that concept beyond recognition.

The same is true of the regulatory standards that respondent claims were violated here—they do not "secure certain benefits." *Roth*, 408 U.S. at 577. This Court has recognized that not every statutory rule of conduct creates a property interest. *E.g.*, *College Sav. Bank* v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 673-75 (1999) (Lanham Act false-advertising provisions do not create a property interest).

Indeed, Congress properly may be reluctant to create property interests because of the collateral consequences that accompany them, such as the protections of procedural due process or the Takings Clause. See, *e.g.*, *Carey*, 435 U.S. at 266. That is why, if Congress intended to create a property right, "we would expect to see some indication of that in the statute itself." *Gonzales*, 545 U.S. at 765. Moreover, to create a property interest in information disseminated by others would raise significant First Amendment concerns. See Trans Union Br. 13-23; Time Br. 25-28.

Respondent and his amici thus obscure the fundamental differences between an entitlement with real value—whether monetary (Medicare or Social Security benefits) or non-pecuniary (the property in-

terest in a guaranteed education)—and a broad cause of action to enforce violations of the law by others. While a deprivation of the former plainly imposes concrete harm, simply having a cause of action for third-party conduct with which one disagrees—or for which one hopes to obtain a bounty—does not.

Second, the statutory violations alleged here are not inevitably, or even usually, accompanied by palpable harm sufficient to satisfy Article III.

Neither respondent nor the government even attempts to explain how the failure to provide notices or a toll-free telephone number inflicted any palpable harm on respondent whatsoever. Nor do they contend that Congress examined the consequences of these violations and made any determination regarding palpable harm. (Nor could any such determination be credited by this Court.) There simply is no basis for upholding respondent's standing to pursue these claims unless a bare statutory violation always is sufficient to satisfy injury in fact.

Not only is such a conclusion legally insupportable, as we have discussed; it also would carry grave practical consequences. Amici describe, for example, the enormous liability exposure that results from the combination of no-harm class actions and technologies used by hundreds of millions of consumers. See eBay Br. 3. And they detail the huge settlement pressure that reduces our adversary system to an assembly line: "(1) file technical regulatory suit seeking astronomical damages; (2) get the class certified; (3) settle." Chamber of Commerce Br. 21. Indeed, it is exactly because no-harm class actions distort the judicial process that they are so attractive to plaintiffs' lawyers. See Experian Br. 25.

Respondent and his amici attempt to show similar adverse consequences if concrete harm is required. But theirs is a parade of red herrings: anyone who has suffered or faces an imminent threat of real-world harm would be able to proceed in court.

Even assuming that respondent's final claim requires proof that the disseminated information was false (see pages 3-4, *supra*), it nonetheless fails to satisfy the concrete harm requirement.

Respondent contends that Congress in the FCRA "identified inaccurate credit reports as causing harm to their subjects." Resp. Br. 32. But Congress never made any such determination.

When it enacted Section 1681e, the FCRA required proof of actual damages. Pub. L. No. 91-508, § 616, 84 Stat. 1127, 1134 (1970). Congress thus did not determine that false information inevitably inflicts harm.

The addition of the statutory damages remedy for willful violations applies to *all* violations—many of which do not require falsity. Pub. L. No. 104-208, Div. A, tit. II, § 2412(b), 110 Stat. 3009-446 (1996).

There accordingly is no basis to conclude that Congress's enactment of the statutory damages provision reflects any determination about false information, let alone that harm generally results from its dissemination.

Even if Congress had made such a determination, moreover, it would not be binding on this Court. A determination actually made by Congress may be entitled to some deference, but the "outer limit to the power of Congress to confer rights of action" is for

this Court to decide. *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring).[13]

III. THE FCRA SHOULD NOT BE CONSTRUED TO PERMIT SUITS WITHOUT PROOF OF CONCRETE HARM.

If the Court concludes that a statutory violation by itself is sufficient to constitute injury in fact—or that resolving that constitutional question presents a difficult issue—it should hold that the FCRA does not have that effect because Congress has not clearly stated its intent to supplant the otherwise-applicable concrete harm requirement. Pet. Br. 53-56; Chamber of Commerce Br. 27-33.[14]

Respondent does not dispute that this Court has in other contexts required Congress to speak clearly before it disrupts the usual constitutional balance. Pet. Br. 53-54. Nothing in the FCRA evidences Congress's intent to supplant the concrete harm requirement.

The statutory prohibitions invoked by respondent are framed as regulatory requirements, not authorizations for suit regardless of harm. When they were enacted, moreover, a private plaintiff could recover only actual damages—making clear that Con-

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[13] Respondent does not seriously dispute that the allegations regarding the impact on him, apart from the claim of a statutory violation, fall short of demonstrating concrete harm. Pet. Br. 52-53. (Certainly his 11th-hour reference to potential harm to dating prospects, Resp. Br. 45 n.6, does not suffice.)

[14] The government's assertion (Br. 31 n.5) that this issue is not properly before the Court is mystifying. It was mentioned in the petition (at 22-23) and is plainly encompassed within the question presented.

gress did *not* intend to displace the concrete harm requirement. See page 22, *supra*.

The statutory damages provision was added by amendment, and applies across the board. See page 22, *supra*. It therefore is most reasonably interpreted to relieve plaintiffs from quantifying damages, not from proving some concrete harm.

Plaintiffs who prove willfulness can recover either "actual damages" or statutory damages, useful when harms are difficult to quantify. 15 U.S.C. § 1681n(a)(1); Pet. Br. 55-56.

Respondent mischaracterizes our argument as requiring proof of actual damages, and then claims it is inconsistent with the statutory text. Resp. Br. 52-54. We agree that "[a]ctual damages are not a gateway to statutory damages" (*id.* at 14). We contend only that a plaintiff must show the concrete harm ordinarily required to satisfy injury in fact; he need not quantify the amount of damages.

Adopting this rule of statutory interpretation will not only resolve this case, it will provide important guidance to lower courts in resolving similar claims under other federal statutes.

CONCLUSION

The judgment of the court of appeals should be reversed.

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SUPPLEMENTAL BRIEF

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No. 13-1339

In the Supreme Court of the United States

SPOKEO, INC.,

Petitioner,

v.

THOMAS ROBINS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

SUPPLEMENTAL BRIEF FOR PETITIONER

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TABLE OF CONTENTS

Page

Table of Authorities ii

Supplemental Brief For Petitioner 1

A. The Government's Failure To Defend The Standing Principle Adopted By The Court Below Confirms The Urgent Need For This Court's Review 2

B. Respondent Lacks Standing Under The Government's Substitute Article III Standard 7

C. The Issue Is Extremely Important 9

Conclusion 12

TABLE OF AUTHORITIES

Page(s)

CASES

Edwards v. *First American Corp.*,
610 F.3d 514 (9th Cir. 2010), cert. granted, 131 S. Ct. 3022 (2011), cert. dismissed as improvidently granted, 132 S. Ct. 2536 (2012) 2

First American Financial Corp. v. *Edwards*, 132 S. Ct. 2536 (2012) 1, 6

Gertz v. *Robert Welch, Inc.*,
418 U.S. 323 (1974) 2, 7

Lujan v. *Defenders of Wildlife*, 504 U.S. 555 (1992) 4

Mabary v. *Home Town Bank, N.A.*,
771 F.3d 820 (5th Cir. 2014) 10

Milkovich v. *Lorain Journal Co.*,
497 U.S. 1 (1990) 2, 7, 8

United States v. *Alvarez*,
132 S. Ct. 2537 (2012) 8

U.S. Dep't of State v. *Ray*,
502 U.S. 164 (1991) 8

STATUTES

Fair Credit Reporting Act
15 U.S.C. § 1681e(b) 4

TABLE OF AUTHORITIES—continued

Page(s)

OTHER AUTHORITIES

Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U. L. Rev. 881 (1983) 1

Restatement (Second) of Torts (1977) 7

SUPPLEMENTAL BRIEF FOR PETITIONER

Given the government's recommendation against certiorari in *First American Financial Corp.* v. *Edwards*, 132 S. Ct. 2536 (2012), and its position on the merits in that case, it is not surprising that the government opposes certiorari here. The government prefers to insulate from this Court's review decisions of courts of appeals that—like the Ninth Circuit's ruling below—uphold standing based on a bare statutory violation.

But the government is unwilling to defend that broad principle in this Court. Instead, it conjures a new rationale to support the Ninth Circuit's judgment—asserting that respondent's claims satisfy Article III because the statutory right allegedly invaded here is analogous to interests whose infringement was cognizable at common law.[1]

Even if the government's alternative theory were correct, that would be a reason to grant review—not deny it. If, as the government apparently contends, the courts of appeals upholding standing are applying the wrong legal principle and routinely failing to address the critical question—whether the statute protects an interest that also was protected at common law—this Court should intervene to clarify the relevant standard. Otherwise, the Court will repeat-

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[1] The government's discussion of general standing principles invokes Justice Scalia's 1983 article to suggest that violation of a statutory right necessarily constitutes injury-in-fact. U.S. Am. Br. 9 (citing Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U. L. Rev. 881, 885 (1983)). But a passage omitted by the government refers to "a minimum requirement of injury in fact which not even Congress can eliminate." Scalia, *supra*, at 885.

edly face cases like this one, in which the party opposing certiorari (and sometimes the government) defends the judgment below on grounds not addressed by the lower court.

Moreover, the government's common-law analogy fails. Contrary to the government's contention, defamation claims without proof of injury were cognizable only when the false information exposed the plaintiff "'to hatred, contempt, or ridicule.'" *Milkovich* v. *Lorain Journal Co.*, 497 U.S. 1, 13 (1990) (quoting *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 370 (1974) (White, J., dissenting)). The information alleged to be false here—depicting respondent as better educated, wealthier, and married—does not satisfy that test.

Finally, the government does not, and cannot, dispute the tremendous practical importance of the question presented, demonstrated in the ten amicus briefs filed by seventeen amici. Review by this Court is plainly warranted.

A. The Government's Failure To Defend The Standing Principle Adopted By The Court Below Confirms The Urgent Need For This Court's Review.

The government's brief is remarkable for its failure to defend the legal rule applied by the court below and the other courts of appeals that have held "injury in law" sufficient to satisfy Article III.

The Ninth Circuit's decision rested on its long-held view that "the violation of a statutory right is usually a sufficient injury in fact to confer standing." Pet. App. 6a (citing *Edwards* v. *First American Corp.*, 610 F.3d 514, 517 (9th Cir. 2010), cert. granted, 131 S. Ct. 3022 (2011), cert. dismissed as improvidently

granted, 132 S. Ct. 2536 (2012)). Because respondent alleged that Spokeo "violated *his* statutory rights, not just the statutory rights of other people," and because those rights are "individualized rather than collective," the alleged statutory violations were "sufficient to satisfy the injury-in-fact requirement of Article III." *Id.* at 8a.

The court below specifically refused to "decide whether [the purportedly concrete harms alleged by respondent] could be sufficient injuries in fact" because its holding that respondent "has standing by virtue of the alleged violations of his statutory rights" was dispositive of the Article III question. *Id.* at 9a n.3.

The Sixth and Eighth Circuits applied precisely the same rationale in holding allegations of a FCRA violation by themselves sufficient to satisfy Article III, without regard to whether the plaintiff suffered any actual injury. Pet. 9; Reply Br. 7.

The government employs two tactics to avoid defending the validity of the broad legal principle that a statutory violation directed at the plaintiff is sufficient by itself to satisfy Article III. *First*, the government significantly mischaracterizes the ruling below, using selective quotation to create the impression that the Ninth Circuit rested its Article III holding on the alleged falsity of the information concerning respondent.

The government combines a snippet from the very first sentence of the opinion with a snippet from the standing discussion many pages later. U.S. Am. Br. 8 ("The court of appeals held that respondent had established Article III standing to sue petitioner 'for publishing inaccurate personal information about

[respondent]' because petitioner allegedly had violated respondent's 'statutory rights' protecting his 'personal interests in the handling of his credit information.'") (quoting Pet. App. 1a, 8a).

In fact, the Ninth Circuit's standing analysis never once refers to the alleged falsity of the information regarding respondent. Pet. App. 4a-9a. The court relied only on the fact that Congress created a statutory right that was "individualized rather than collective"—in other words, the statute did not confer an "'undifferentiated public interest in executive officers' compliance with the law.'" *Id.* at 8a (quoting *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 577 (1992)).[2]

The government tries to bolster its claim that the ruling below rested on the alleged inaccuracy of the transmitted information by incorrectly asserting that the court below addressed standing with respect to only one of respondent's four claimed Fair Credit Reporting Act (FCRA) violations—his invocation of 15 U.S.C. § 1681e(b), which requires a credit reporting agency to "follow reasonable procedures to assure maximum possible accuracy of" consumer reports. U.S. Am. Br. 10-11, 16. In fact, the Ninth Circuit treated each of the claimed violations identically, list-

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[2] Indeed, the Ninth Circuit's standing analysis described respondent's injury, not in terms of false information, but rather as an affront to his "personal interest[ ] in the *handling* of his credit information." Pet. App. 8a (emphasis added).

The government asserts in passing that respondent pleaded monetary injury (U.S. Am. Br. 5). In fact, respondent alleged only that he was unemployed—a status he did not blame on petitioner; that, "[b]ecause [respondent] is unemployed, he has lost and continues to lose money," FAC ¶ 36; and his "employment prospects" were harmed. *Id.* ¶ 35.

ing them once at the outset of its standing analysis (Pet. App. 4a) but *never* referring to the particulars of any violation again (*id.* at 4a-9a).[3]

Once the government's claimed distinction among respondent's claims collapses, so does its Potemkin opinion. None of the other alleged violations requires proof that the disseminated information was inaccurate. They involve the supposed failure to provide required notices and to post a toll-free number. See U.S. Am. Br. 16. Because proof of inaccuracy is not an element of these claims, the Ninth Circuit could not rely on alleged inaccuracy to support Article III standing, and the government's characterization of the court's opinion is exposed as a fabrication.

Second, the government invents a new, narrower principle for upholding respondent's standing—a rationale neither presented to nor adopted by the court of appeals. In the government's view, the proper inquiry is whether "[c]ourts have long recognized" that infringement of "legally protected interests" that are "similar" to the statutory right provides a basis for suit. U.S. Am. Br. 11. Alternatively, standing may be upheld if the statute effects only "a modest legislative expansion of the circumstances in which" courts traditionally have entertained suit. *Id.* at 14. The government's argument is wrong as a matter of defamation law, as we discuss below (at 7-8). But the critical point is that the government's analysis concedes that a statutory violation can support standing

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[3] The government bizarrely takes petitioner to task for "virtually ignor[ing]" the elements of the causes of action and the allegations of the complaint. U.S. Am. Br. 7. But it is the *court of appeals* that deemed those factors irrelevant to its standing analysis.

only if the injury supporting the cause of action is either the same as or a "modest legislative expansion of" an injury that was cognizable at common law.

The government's argument thus confirms the urgent need for review by this Court, because it demonstrates that the lower courts are applying an erroneous standard to uphold standing based on a bare statutory violation. On the government's view, these courts should not be declaring Article III satisfied on the basis of a statutory violation directed at the plaintiff. Rather, they must inquire whether the statutory violation requires proof of an injury actionable at common law—or at least represents only a modest expansion of such a common-law injury.

Whether petitioner is correct that only actual injury can satisfy Article III or the government's legislatively-authorized analogous injury approach is correct, one thing is crystal clear: the lower courts that uphold "injury in law" standing do not apply either test, but instead invoke the broad principle that *any* statutory violation directed at an individual is sufficient to establish standing, as the Ninth Circuit did here.

This Court should not tolerate a situation in which federal courts frequently reject standing challenges and allow lawsuits to proceed based on an incorrect standard that even the government is unwilling to defend. The Court's guidance regarding the proper approach is urgently needed.[4]

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[4] The government's brief evidences a significant shift from *First American*. At the certiorari stage in that case, the government defended the broad "injury in law" standing principle applied by the Ninth Circuit. Brief for the United States as Amicus Curiae 10-13, No. 10-708 (May 2011). At the merits

B. Respondent Lacks Standing Under The Government's Substitute Article III Standard.

The government's newly-minted Article III test provides no basis for upholding respondent's standing here.

The government contends that the dissemination of "inaccurate information about respondent in violation of respondent's rights *is* a tangible harm." U.S. Am. Br. 11 (emphasis preserved; internal quotation marks omitted). It mistakenly suggests that the common-law action for defamation, which does not require any proof of damage, encompasses all transmissions of inaccurate information. *Ibid.*

In fact, defamation's presumption of injury—"an oddity of tort law" (*Gertz*, 418 U.S. at 349)—reaches *only* false information that exposes its subject "to hatred, contempt, or ridicule." *Milkovich*, 497 U.S. at 13. The government's assertion that all defamation suits may be maintained without proof of actual injury ignores that the defamation tort itself is limited to disparaging statements that meet the *Milkovich* test. Restatement (Second) of Torts § 559 (1977) ("A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him."). The presumption of injury is thus restricted to disparaging

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stage, the government maintained that position, relying on an analogy to actions permitted at common law only as a fallback position. Brief for the United States as Amicus Curiae 13-27, No. 10-708 (Oct. 2011). Here, the government has abandoned the broad argument, relying only on the analogy to common-law actions.

statements because of the limit on the scope of the defamation tort.

Here, petitioner allegedly permitted searchers to find information inaccurately stating that respondent was married with children and overstating his financial resources and education. None of those characteristics elicits "hatred, contempt, or ridicule." *Milkovich*, 497 U.S. at 13; see Reply Br. 3-4.

Moreover, the First Amendment protects false statements as well as true ones except when the statements reflect "defamation, fraud, or some other legally cognizable harm associated with a false statement." *United States* v. *Alvarez*, 132 S. Ct. 2537, 2545 (2012) (plurality op.). The constitutional limitations on presuming injury from speech undercut the government's contention that, to the extent that Congress made the dissemination of harmless inaccurate information actionable under FCRA, it permissibly undertook, "at the very most, a modest legislative expansion." U.S. Am. Br. 14.

The government also invokes general statements regarding privacy to assert that the harmless dissemination of information about an individual is a tangible harm to the individual's interest in "avoiding public disclosure" of personal information. *Id.* at 12. But neither of the cited cases involved common-law actions by persons claiming invasion of privacy, and they therefore provide no support for the government's assertion that respondent's claim involves traditionally-actionable interests. Indeed, the government does not even try to establish that the disclosure of "personal information regarding marital and employment status" (*Ibid.* (quoting *U.S. Dep't of State* v. *Ray*, 502 U.S. 164, 175 (1991))) is actionable in tort in the absence of harm. And respondent has

never contended that he was injured by the exposure of information that he had a right to keep private.

Casting further afield for analogies to support standing without concrete injury, the government invokes decisions addressing statutory restrictions on the government's own production of records or dissemination of information. *Id.* at 11-12 & n.1. But those cases, too, involve statutory claims, not settled common-law doctrine.

In any event, these merits arguments concerning a legal theory not addressed by the court of appeals provide no reason to deny review—they relate only to one of respondent's multiple FCRA claims (see pages 4-5, supra) and are properly addressed on remand after this Court clarifies the standard for determining whether a statutory violation in the absence of actual injury suffices to establish Article III standing.

C. The Issue Is Extremely Important.

The government does not dispute that numerous federal statutes purport to create standing based on a bare statutory violation; that suits based on such statutes are frequently met by standing challenges; that the lower courts apply conflicting standards in resolving those standing disputes; and that the lower courts upholding standing generally apply the broad principle invoked by the Ninth Circuit here.

If any further demonstration of the issue's importance were required, it is supplied by the ten *amicus* briefs explaining the very substantial impact of these lawsuits in a variety of legal contexts. See also Reply Br. 8-9.

In response, the government presents two reasons why this Court should deny review. Both are insubstantial.

First, the government argues that there is no conflict warranting review because the Second, Fourth, and Federal Circuit decisions address different statutes and those courts inquire whether the plaintiff has suffered an actual injury. U.S. Am. Br. 20-22; see also Reply Br. 9-10.

That is precisely the point. A plaintiff in those circuits must show actual injury, and a statutory violation directed at the plaintiff does not automatically suffice.[5] In the Ninth, Sixth, and Eighth Circuits, by contrast, the allegation of a federal statutory violation is sufficient as long as it is directed at the plaintiff and not someone else or the public at large; actual injury is not required.

The government's claim that there is no conflict is therefore tied to its reimagining of the Ninth Circuit's opinion in this case as turning on the alleged falsity of the information disseminated by petitioner *and* the government's flawed conclusion that all disseminations of false information were actionable at common law without proof of injury. U.S. Am. Br. 17-18. The legal rule that the Ninth Circuit actually ap-

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[5] In addition, Judge Jolly of the Fifth Circuit—dissenting from a decision that found standing on a theory of concrete injury that the plaintiff had not raised—recently stated that, while "Congress's creation of a cause of action can make an injury legally cognizable," it cannot "make a non-injury justiciable in an Article III court." *Mabary* v. *Home Town Bank, N.A.*, 771 F.3d 820, 830 (5th Cir. 2014), *appeal dismissed per stipulation*, No. 13-20211 (Jan 8, 2015).

plied squarely conflicts with the rule applied by at least two other circuits.

Finally, the government reprises respondent's argument that there is no conflicting decision involving claims under FCRA. Why would a plaintiffs' lawyer file a nationwide FCRA class action in a circuit requiring proof of actual injury, when a case filed in the Ninth Circuit benefits from the generous standing test applied below? And no conflict over FCRA is necessary to demonstrate the lower courts' conflicting approaches to Article III.

Second, the government deems irrelevant the inevitable consequences of the standing rule applied below—extraordinarily large damages awards and facilitation of class certification. See Pet. 14-16; Reply Br. 9; U.S. Am. Br. 15, 23.

But those consequences—and the resulting coercion to settle gigantic class actions involving no actual harm—demonstrate the practical importance of ensuring that lower courts undertake the proper standing inquiry. That is why this Court's review is plainly warranted.[6]

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[6] The government asserts (U.S. Am. Br. 17, 19) that the question presented is not properly framed because it does not focus on the government's substitute rationale. The government advocates (*id.* at 19) a question (1) limited to one of respondent's multiple FCRA claims, even though the Ninth Circuit addressed all of the claims (see pages 4-5, *supra*); and (2) emphasizing the alleged inaccuracy of the disseminated information, even though the court below placed no reliance on that allegation (see page 4, *supra*).

But mentioning the statutory provisions is unnecessary, because the Court always addresses a question in the context of the case in which it arises. More significantly, the government's

CONCLUSION

The petition for a writ of certiorari should be granted.

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revision mischaracterizes the court of appeals' holding; the question presented, by contrast, mirrors the lower court's broad holding. See pages 3-6, *supra*. No rule of this Court requires petitioners to frame questions presented on the basis of the alternative arguments advanced by those seeking to defend the judgment on other grounds.

A question based on the court of appeals' rationale that encompasses the standing challenges to all of respondent's claims could be:

> Whether respondent's allegations of violations of the Fair Credit Reporting Act, without more, are sufficient to establish standing under Article III to assert causes of action based on those violations.

REPLY BRIEF

Supreme Court, U.S.
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No. 13-1339

In the Supreme Court of the United States

SPOKEO, INC., PETITIONER

v.

THOMAS ROBINS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether respondent's complaint identified an Article III injury-in-fact by alleging that petitioner had willfully violated 15 U.S.C. 1681e(b) by publishing inaccurate personal information about respondent in consumer reports prepared by petitioner without following reasonable procedures to assure the information's accuracy.

TABLE OF CONTENTS

Page

Interest of the United States 1
Statement 2
Summary of argument 6
Argument:
Respondent has sufficiently alleged his Article III standing to sue 9
A. The invasion of respondent's "legally protected interest" in preventing a CRA from reporting inaccurate personal information about him to others is an Article III injury-in-fact 10
B. The Court's development of the injury-in-fact requirement confirms that standing may rest on the invasion of a plaintiff's "legally protected interest" 16
C. Common-law courts have long adjudicated claims alleging violations of a plaintiff's legal rights, even when the plaintiff suffered no further consequential injury 19
D. Because respondent's suit alleges a violation of his own statutory rights, and because his allegation that petitioner disseminated false information about him is closely analogous to a common-law defamation claim, adjudicating the suit would accord with traditional understandings of the judicial role 23
E. Petitioner's challenges to respondent's Article III standing are without merit 28
F. The Court's Article III analysis should focus on respondent's principal claim under 15 U.S.C. 1681e(b) 31
Conclusion 34
Appendix — Statutory provisions 1a

TABLE OF AUTHORITIES

Cases: Page

Adarand Constructors, Inc. v. *Pena*, 515 U.S. 200 (1995) 13
Arizona Christian Sch. Tuition Org. v. *Winn*, 131 S. Ct. 1436 (2011) 18
Arizona State Legislature v. *Arizona Indep. Redistricting Comm'n*, 135 S. Ct. 2652 (2015) 18
Association of Data Processing Serv. Orgs., Inc. v. *Camp*, 397 U.S. 150 (1970) 16
Barlow v. *Collins*, 397 U.S. 159 (1970) 16
Carey v. *Piphus*, 435 U.S. 247 (1978) 22
DaimlerChrysler Corp. v. *Cuno*, 547 U.S. 332 (2006) 11
Department of Justice v. *Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989) 27
Department of State v. *Ray*, 502 U.S. 164 (1991) 27
Department of the Army v. *Blue Fox, Inc.*, 525 U.S. 255 (1999) 21
Entick v. *Carrington*, (1765) 95 Eng. Rep. 807 (K.B.) 20
FEC v. *Akins*, 524 U.S. 11 (1998) 14, 15
Farrar v. *Hobby*, 506 U.S. 103 (1992) 22
Feltner v. *Columbia Pictures Television, Inc.*, 523 U.S. 340 (1998) 32
Gertz v. *Robert Welch, Inc.*, 418 U.S. 323 (1974) 26
Havens Realty Corp. v. *Coleman*, 455 U.S. 363 (1982) 13, 14
Linda R.S. v. *Richard D.*, 410 U.S. 614 (1973) 11, 18
Lujan v. *Defenders of Wildlife*, 504 U.S. 555 (1992) ..... *passim*
M&G Polymers USA, LLC v. *Tackett*, 135 S. Ct. 926 (2015) 32

Cases—Continued: Page

Maracich v. *Spears*, 133 S. Ct. 2191 (2013) 31
Marbury v. *Madison*, 5 U.S. (1 Cranch) 137 (1803) 21, 29
Marzetti v. *Williams*, (1830) 109 Eng. Rep. 842 (K.B.) 20
Massachusetts v. *EPA*, 549 U.S. 497 (2007) 11
Mayor of London v. *Mayor of Lynn*, (1796) 126 Eng. Rep. 1026 (H.L.) 21
Northeastern Fla. Chapter of the Associated Gen. Contractors of Am. v. *City of Jacksonville*, 508 U.S. 656 (1993) 10, 13, 18
Public Citizen v. *Department of Justice*, 491 U.S. 440 (1989) 14, 15
Robert Marys's Case, (1613) 77 Eng. Rep. 895 (K.B.) 23
Safeco Ins. Co. of Am. v. *Burr*, 551 U.S. 47 (2007) 3
Schlesinger v. *Reservists Comm. to Stop the War*, 418 U.S. 208 (1974) 3, 17
Sierra Club v. *Morton*, 405 U.S. 727 (1972) 17
Sorrell v. *IMS Health Inc.*, 131 S. Ct. 2653 (2011) 27
Steel Co. v. *Citizens for a Better Env't*, 523 U.S. 83 (1998) 19
Summers v. *Earth Island Inst.*, 555 U.S. 488 (2009) ... 11, 30
Tennessee Elec. Power Co. v. *TVA*, 306 U.S. 118 (1939) 16
Thorley v. *Kerry*, (1812) 128 Eng. Rep. 367 (Exch. Chamber) 25
United States v. *Jones*, 132 S. Ct. 945 (2012) 19
United States v. *Windsor*, 133 S. Ct. 2675 (2013) 18
Vermont Agency of Natural Res. v. *United States ex rel. Stevens*, 529 U.S. 765 (2000) 19, 26, 28
Warth v. *Seldin*, 422 U.S. 490 (1975) 11, 14, 18

Cases—Continued: Page

Webb v. *Portland Mfg. Co.*, 29 F. Cas. 506 (C.C.D. Me. 1838) 21
Whittemore v. *Cutter*, 29 F. Cas. 1120 (C.C.D. Mass. 1813) 21
Wilcox v. *Executors of Plummer*, 29 U.S. (4 Pet.) 172 (1830) 20
Zivotofsky v. *Clinton*, 132 S. Ct. 1421 (2012) 16
Zivotofsky v. *Kerry*, 135 S. Ct. 2076 (2015) 16
Zivotofsky v. *Secretary of State*, 444 F.3d 614 (D.C Cir. 2006) 15

Constitution, statutes, and regulations:

U.S. Const.:
Art. III ..... *passim*
§ 2 10
Copyright Act of 1790, ch. 15, 1 Stat. 124 33
Credit Repair Organizations Act, 15 U.S.C. 1679g(a)(1)(B) 33
Electronic Fund Transfer Act, 15 U.S.C. 1693m(a)(2) 33
Fair Credit Reporting Act, 15 U.S.C. 1681 *et seq.* 1
15 U.S.C. 1681a(d)(1) 2, 12, 1a
15 U.S.C. 1681b 2
15 U.S.C. 1681b(a) 12
15 U.S.C. 1681b(a)(1)-(6) 28
15 U.S.C. 1681b(b)(1) 31
15 U.S.C. 1681e(b) 3, 4, 12, 31, 4a
15 U.S.C. 1681e(d)(1)(A) 31
15 U.S.C. 1681e(d)(1)(B) 31
15 U.S.C. 1681a(f) 2, 3a
15 U.S.C. 1681n 1, 5a
15 U.S.C. 1681n(a) 3, 9, 25, 31, 5a

Statutes and regulations—Continued: Page

15 U.S.C. 1681*o* 1, 6a
15 U.S.C. 1681*o*(a) 3, 9, 6a
Fair Housing Act, 42 U.S.C. 3601 *et seq* 13
Federal Advisory Committee Act, 5 U.S.C. App. 1 14
Federal Election Campaign Act of 1971, 2 U.S.C. 431 *et seq.* 14
Freedom of Information Act, 5 U.S.C. 552 14
Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. 1801 *et seq.*:
29 U.S.C. 1821(a) 33
29 U.S.C. 1821(b) 33
29 U.S.C. 1831(a) 33
29 U.S.C. 1831(b) 33
29 U.S.C. 1843 33
29 U.S.C. 1854(c)(1) 33
Telephone Consumer Protection Act of 1991, 47 U.S.C. 227 *et seq.*:
47 U.S.C. 227(b)(1)(A)(iii) 33
47 U.S.C. 227(b)(1)(B) 33
47 U.S.C. 227(b)(3)(B) 33
15 U.S.C. 1117(c) 33
17 U.S.C. 504(a) 32
17 U.S.C. 504(c) 32
17 U.S.C. 911(c) 33
18 U.S.C. 2710(b) 33
18 U.S.C. 2710(c)(2)(A) 33
18 U.S.C. 2724(a) 33
18 U.S.C. 2724(b)(1) 33
47 U.S.C. 605(a) 33
47 U.S.C. 605(e)(3)(C)(i)(II) 33

Regulation—Continued: Page

12 C.F.R. 1022.137(a)(1) 31

Miscellaneous:

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1 Restatement (First) of Contracts (1932) 20

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Vol. 1 (1934) 19, 20, 27

Vol. 3 (1938) 26

Vol. 4 (1939) 19, 22

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Vol. 1 (1965) 20

Vol. 3 (1977) 26

Vol. 4 (1979) 22

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S. Rep. No. 517, 91st Cong., 1st Sess. (1969) 2

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In the Supreme Court of the United States

No. 13-1339

SPOKEO, INC., PETITIONER

v.

THOMAS ROBINS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING RESPONDENT

INTEREST OF THE UNITED STATES

The Fair Credit Reporting Act (FCRA), 15 U.S.C. 1681 *et seq.*, imposes various requirements on certain entities that regularly compile and disseminate personal information about individual consumers. FCRA provides those consumers with a cause of action to recover actual or statutory damages for certain violations of the Act. 15 U.S.C. 1681n, 1681o. FCRA's private right of action provides an important supplement to the federal government's own enforcement efforts. Many federal laws contain similar provisions authorizing persons whose statutory rights have been violated to sue for statutory damages. The United States therefore has a substantial interest in the question presented. At the Court's invitation, the United

States filed a brief as amicus curiae at the petition stage of this case.

STATEMENT

1. Congress enacted FCRA to address developments in "computer technology [that] facilitated the storage and interchange of information" and "open[ed] the possibility of a nationwide data bank covering every citizen." S. Rep. No. 517, 91st Cong., 1st Sess. 2 (1969) (*Senate Report*). Congress designed FCRA "to prevent consumers from being unjustly damaged because of inaccurate or arbitrary information," and "to prevent an undue invasion of the individual's right of privacy in the collection and dissemination of credit information." *Id.* at 1.

Under FCRA, a "consumer reporting agency" (CRA) is a person who, for monetary fees, dues, or on a cooperative basis, "regularly engages * * * in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties." 15 U.S.C. 1681a(f). With exceptions not relevant here, a "consumer report" is a CRA's "communication of any information * * * bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living" if that communication "is used or expected to be used or collected in whole or in part" for "the purpose of serving as a factor in establishing the consumer's eligibility for" specified matters, including employment, credit, and insurance. 15 U.S.C. 1681a(d)(1); see 15 U.S.C. 1681b (listing "[p]ermissible purposes of consumer reports").

Two FCRA provisions are principally implicated here. First, FCRA requires that, "[w]henever a [CRA]

prepares a consumer report," it "shall follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates." 15 U.S.C. 1681e(b). Second, FCRA provides that "[a]ny person who willfully fails to comply with any requirement imposed under [FCRA] with respect to any consumer is liable to that consumer" for "any actual damages sustained" or statutory "damages of not less than $100 and not more than $1,000," plus "punitive damages as the court may allow." 15 U.S.C. 1681n(a).[1] "Willful" violations of FCRA are "knowing violations" and reckless violations in which the defendant acts based on an "objectively unreasonable" reading of FCRA, creating an "'unjustifiably high risk' of violating the statute." See *Safeco Ins. Co. of Am.* v. *Burr*, 551 U.S. 47, 57, 68-70 (2007) (citation omitted).

2. Respondent's putative class-action complaint alleged that petitioner is a CRA that operates a website, spokeo.com, on which users can obtain information about individuals. J.A. 7, 18. Respondent alleged that any person can obtain from that website a wide range of information about the subject of a search, including the individual's "address, phone number, marital status, age, employment information, education, [and] ethnicity"; the "names of [his or her] siblings and parents"; and even "items [the individual has] sought from websites such as Amazon.com, and music [the individual has] listened to on websites such as Pandora.com." J.A. 10. Petitioner's website also allegedly provides information about the individual's "economic health" (which petitioner formerly labeled a "credit

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[1] For negligent violations, the defendant is liable for "actual damages." 15 U.S.C. 1681o(a).

estimate"), "wealth level," and, until shortly before respondent's complaint was filed, "mortgage value," "estimated income," and "investments." J.A. 10-11. Respondent alleged that petitioner has "actively marketed it[s] services to employers for the purpose of evaluating potential employees." J.A. 13; see J.A. 9, 13, 20.

Petitioner's website allegedly disseminated a consumer report about respondent that inaccurately reported, *inter alia*, respondent's age and wealth and that respondent was employed, possessed a graduate degree, and was married with children. J.A. 13-14. Respondent alleged that petitioner had disseminated that erroneous information about him when he was "out of work and seeking employment," causing both past and continuing "actual harm to [his] employment prospects," monetary injury, and emotional injury from anxiety about his "diminished employment prospects." J.A. 14-15.

Respondent alleged that petitioner had willfully violated 15 U.S.C. 1681e(b) by failing to "follow reasonable procedures to assure the maximum possible accuracy" of his consumer-report information. J.A. 18-19, 21. Respondent further alleged that petitioner had violated additional FCRA provisions by failing to provide required notices to persons that furnish it information about consumers, J.A. 20; by failing to provide required notices to, and obtain certifications from, users of its consumer reports, J.A. 20-22; and by failing to post on its website a toll-free number for requesting free annual reports, J.A. 22-23. Respondent alleged that those violations had caused him "harm as described [in his complaint]," J.A. 21-23, and

he requested both statutory damages and injunctive relief, J.A. 25.

3. The district court initially denied petitioner's motion to dismiss. Pet. App. 15a-22a. As relevant here, the court concluded that respondent had sufficiently alleged an Article III "injury in fact—the 'marketing of inaccurate consumer reporting information about [respondent].'" *Id.* at 18a (citation omitted).

On reconsideration, the district court dismissed respondent's suit. Pet. App. 23a-24a. The court concluded that a "[m]ere violation of [FCRA] does not confer Article III standing * * * where no injury in fact is properly pled," and that "the alleged harm to [respondent's] employment prospects" was too "speculative, attenuated and implausible" to satisfy constitutional requirements. *Id.* at 23a.

4. The court of appeals reversed and remanded. Pet. App. 1a-10a. The court framed the question before it as "whether [respondent] has Article III standing to sue a website's operator under [FCRA] for publishing inaccurate personal information about [respondent]." *Id.* at 1a. The court held that respondent's complaint satisfied Article III. *Id.* at 4a-9a.

The court of appeals explained that "Congress's creation of a private cause of action to enforce a statutory provision implies that Congress intended the enforceable provision to create a statutory right," and that "the violation of a statutory right is usually a sufficient injury in fact to confer standing." Pet. App. 6a. The court acknowledged that "the Constitution limits the power of Congress to confer standing." *Id.* at 7a. The court explained, however, that those limits do "not prohibit Congress from 'elevating to the status of legally cognizable injuries concrete, *de facto* inju-

ries that were previously inadequate in law.'" *Id.* at 7a-8a (citation omitted).

Respondent's suit, the court of appeals concluded, does not violate any "constitutional limitations on congressional power to confer standing." Pet. App. 8a. The court explained that respondent was "'among the injured'" because petitioner had allegedly "violated *his* statutory rights, not just the statutory rights of other people." *Ibid.* (citation omitted). The court further held that "the interests protected by the statutory rights at issue are sufficiently concrete and particularized that Congress can elevate them" by statute to Article III injuries. *Ibid.* After determining that causation and redressability had been sufficiently pleaded, the court concluded that respondent "adequately alleges Article III standing." *Id.* at 9a. In light of that holding, the court of appeals did not decide "whether harm to [respondent's] employment prospects or related anxiety could be sufficient injuries in fact." *Id.* at 9a n.3.

SUMMARY OF ARGUMENT

A. FCRA confers upon respondent a legal right to avoid the dissemination of inaccurate personal information about himself under the circumstances presented here. Under this Court's precedents, a violation of that legal right is an injury sufficient to satisfy Article III requirements, whether or not respondent can identify further consequential harms resulting from the violation. In a variety of contexts, this Court has recognized the Article III standing of plaintiffs who alleged violations of similar legal rights.

B. In developing the injury-in-fact requirement in a line of decisions beginning in 1970, this Court explicitly sought to *expand* the pre-existing categories of

judicially cognizable injury. The thrust of those decisions was that, even when a plaintiff has no particularized *legal* interest in the challenged government action (as when the plaintiff challenges agency decisions concerning the appropriate use of public lands), he can establish standing to sue if that action will cause him distinct practical harm. That expanded conception of judicially cognizable injury, however, did not eliminate the plaintiff's option of establishing Article III standing by demonstrating an invasion of his own legally protected interests.

C. Historical practice confirms that the violation of a particularized statutory right is a constitutionally sufficient basis for suing in an Article III court. Common-law courts traditionally have adjudicated suits alleging violations of specific legal interests, such as a trespass onto real property or a breach of contract, even if the plaintiff has identified no consequential harm beyond the violation itself.

D. Although Congress can create (and authorize private judicial enforcement of) new statutory rights that have no common-law analog, its power to act is particularly clear when such an analog exists. Common-law defamation provides a close analog to respondent's FCRA claim. Common-law courts distinguished between written and oral defamation, and they treated the former as actionable per se without proof of further consequential harm. Petitioner seeks to distinguish those decisions on the ground that the particular false statements it allegedly made about respondent would not have been treated at common law as defamation per se. But common-law courts routinely modified the scope and contours of existing private rights, and there is no plausible basis for ques-

tioning Congress's power to enact similar adjustments. Any deviation from common-law principles is extremely slight here, since Congress at most has modestly expanded the categories of false statements that will be deemed actionable without proof of further consequential harm.

E. Petitioner's challenges to respondent's Article III standing lack merit. Respondent alleges not simply a statutory violation, but a violation of his *own* statutory rights. Congress's authorization of that suit does not represent a transfer of Executive power to private actors, but simply allows respondent to utilize the traditional means by which individuals enforce their own legal rights. And neither respondent's stated intention to seek certification of a class, nor the extent of the recovery that a class action might entail, is relevant to the Article III analysis.

F. The Court should focus on the principal claim asserted in respondent's complaint, which involves petitioner's alleged dissemination of inaccurate personal information about him. If this Court agrees with the court of appeals that respondent has standing to pursue that claim, the courts below can analyze on remand whether respondent satisfies Article III with respect to his remaining allegations. The FCRA statutory-damages provision at issue here is similar to many other provisions that authorize suits to be filed by private parties whose own statutory rights have been violated, whether or not any further consequential harm is shown. The Article III analysis of any such provision can depend in part on the details of the relevant statutory scheme. Congress did not venture close to the constitutional line, however, in providing a statutory-damages remedy for the public dissemina-

tion of inaccurate personal information about the plaintiff himself.

ARGUMENT

RESPONDENT HAS SUFFICIENTLY ALLEGED HIS ARTICLE III STANDING TO SUE

The court of appeals described the question before it as "whether an individual has Article III standing to sue a website's operator under [FCRA] for publishing inaccurate personal information about himself." Pet. App. 1a. The court correctly answered that question in the affirmative.

This Court has repeatedly recognized that the "actual" invasion of a "legally protected interest" will constitute an Article III injury-in-fact if it is "concrete" and "particularized." Under FCRA, an action for damages can be brought only by a consumer seeking compensation for a violation of a "requirement imposed under [FCRA] with respect to * * * *that* consumer." 15 U.S.C. 1681n(a), 1681*o*(a) (emphasis added). Far from raising a generalized grievance, respondent alleges that his own statutory rights were violated when petitioner disseminated "inaccurate personal information about himself." Pet. App. 1a; see J.A. 13-14. Although Congress has ample power to create new statutory rights and to provide for their effective private enforcement, even in the absence of a common-law analog, its power to authorize private suits is particularly clear where such an analog exists. Respondent's FCRA claim is closely analogous to a defamation suit, which courts have traditionally adjudicated without requiring plaintiffs to allege or prove some further consequential harm beyond the defamatory communication itself.

A. The Invasion Of Respondent's "Legally Protected Interest" In Preventing A CRA From Reporting Inaccurate Personal Information About Him To Others Is An Article III Injury-In-Fact

1. The "[J]udicial Power" of the United States extends only to Article III "Cases" and "Controversies." U.S. Const. Art. III, § 2. This Court developed the doctrine of Article III standing as "an essential and unchanging part of the case-or-controversy requirement." *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (*Defenders*). Under that doctrine, "a party seeking to invoke a federal court's jurisdiction must demonstrate three things": "(1) 'injury in fact,' by which [the Court] mean[s] an invasion of a legally protected interest" that meets certain requirements; "(2) a causal relationship between the injury and the challenged conduct"; and "(3) a likelihood that the injury will be redressed by a favorable decision." *Northeastern Fla. Chapter of the Associated Gen. Contractors of Am.* v. *City of Jacksonville*, 508 U.S. 656, 663 (1993) (*Associated Gen. Contractors*) (quoting *Defenders*, 504 U.S. at 560). The question presented here concerns the injury-in-fact requirement.

To qualify as an "injury in fact," an asserted "invasion of [the plaintiff's] legally protected interest" must be "actual or imminent" and both "concrete" and "particularized." *Defenders*, 504 U.S. at 560. A "[c]oncrete injury," unlike an "abstract" one, provides "the essential dimension of specificity to the dispute." *Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U.S. 208, 220-221 (1974). A "particularized" invasion, in turn, is one that "affect[s] the plaintiff in a personal and individual way," *Defenders*, 504 U.S. at 560 n.1, rather than in "some indefinite way in common with

people generally," *DaimlerChrysler Corp.* v. *Cuno*, 547 U.S. 332, 344 (2006) (citation omitted).

The Court has long recognized that the "injury required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing.'" *Warth* v. *Seldin*, 422 U.S. 490, 500 (1975) (quoting *Linda R.S.* v. *Richard D.*, 410 U.S. 614, 617 n.3 (1973)); accord *Defenders*, 504 U.S. at 578. Because an "injury in fact" is itself an "invasion of a legally protected interest," *Defenders*, 504 U.S. at 560, and because such an injury is "by definition no more than the violation of a legal right," it follows that "legal rights can be created by the legislature," and that their violation will constitute judicially cognizable injury to the individual to whom the legislature has granted the "*personal*[]" right. Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U. L. Rev. 881, 885 (1983) (concluding that a "characteristic of standing" is "that its existence in a given case is largely within the control of Congress"). Accordingly, "Congress has the power to define injuries * * * that will give rise to a case or controversy where none existed before." *Massachusetts* v. *EPA*, 549 U.S. 497, 516 (2007) (quoting *Defenders*, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in the judgment)).

Congress does not have *unlimited* power to define the class of plaintiffs who may sue in federal court to redress an alleged violation of law. "[T]he requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute." *Summers* v. *Earth Island Inst.*, 555 U.S. 488, 497 (2009). "[T]he public interest in proper administration of the laws," for instance, cannot "be converted into an

individual right by a statute that denominates it as such, and that permits all citizens (or, for that matter, a subclass of citizens who suffer no distinctive concrete harm) to sue." *Defenders*, 504 U.S. at 576-577. But Congress can grant individuals new statutory rights, and can authorize persons whose own rights are violated to obtain relief in court, even where the proscribed conduct has not previously been viewed as an actionable wrong.

That principle applies here. FCRA requires a CRA to "follow reasonable procedures to assure maximum possible accuracy of the information concerning [an] individual" when it "prepares a consumer report" about him. 15 U.S.C. 1681e(b). FCRA defines "consumer report" to mean a CRA's actual "communication" of information in certain categories that relates to a consumer and is either used or expected to be used or collected for specified purposes. 15 U.S.C. 1681a(d)(1); see p. 2, *supra*; see also 15 U.S.C. 1681b(a) (identifying the circumstances in which a CRA may disseminate a consumer report). FCRA thus grants an individual consumer a statutory entitlement—a legally protected interest—to be free from a CRA's *actual* reporting of inaccurate information about him to others when the CRA fails to employ "reasonable procedures" to assure the "maximum possible accuracy" of the information. A CRA's violation of that right subjects the consumer involved to a "concrete" and "particularized" injury, even if no other consequential harm results.

2. This Court has repeatedly upheld plaintiffs' Article III standing in similar contexts in which plaintiffs sought judicial relief from allegedly unlawful conduct

that invaded their legally recognized interests, even when no further consequential harm was identified.

In *Associated General Contractors*, the Court held that an association, whose members included non-minority contractors who regularly bid on contracts offered by the City of Jacksonville, had Article III standing to challenge the city's minority set-aside ordinance. 508 U.S. at 659, 664-666. The Court held that the association need not allege that any of its members ultimately would have won a contract in the absence of the ordinance. Rather, the Court held, an Article III "injury in fact" is established by "an invasion of a legally protected interest," and the members' "'injury in fact' [wa]s the inability to compete on an equal footing in the bidding process, not the loss of a contract." *Id.* at 663, 666; see *Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200, 211 (1995) (similar where contractor failed to show that it would ever be "the low bidder").

In *Havens Realty Corp.* v. *Coleman*, 455 U.S. 363, 374 (1982), the Court held that an "injury to [an individual's] statutorily created right to truthful housing information" was sufficient without more to establish Article III standing. The Court considered the standing of two "testers" who had posed as prospective renters to document unlawful housing practices. *Id.* at 373. The Court held that the tester who had been falsely told that particular housing was unavailable had Article III standing to sue, even though she may have "fully expected that [she] would receive false information" and had no "intention of buying or renting a home." *Id.* at 374. The Court explained that the Fair Housing Act, 42 U.S.C. 3601 *et seq.*, "establishes an enforceable right to truthful information"; that the

"injury required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing'"; and that such an injury had been shown because the defendant had violated the tester's "legal right to truthful information." 455 U.S. at 373 (quoting *Warth*, 422 U.S. at 500). The Court further held that, because the second tester-plaintiff had received truthful information, he had alleged "no injury to his statutory right to accurate information" and therefore lacked Article III standing. *Id.* at 374-375.[2]

Other decisions follow the same course. The Court has held that plaintiffs seeking records under the Federal Advisory Committee Act (FACA), 5 U.S.C. App. 1, or the Freedom of Information Act (FOIA), 5 U.S.C. 552, can establish Article III standing simply by showing "that they sought and were denied specific agency records." *Public Citizen* v. *Department of Justice*, 491 U.S. 440, 449 (1989). In those contexts, "a plaintiff suffers an 'injury in fact' when the plaintiff fails to obtain information which must be publicly disclosed pursuant to a statute." *FEC* v. *Akins*, 524 U.S. 11, 21 (1998) (discussing *Public Citizen*). The same holds true for claims seeking certain disclosures under the Federal Election Campaign Act of 1971 (FECA), 2 U.S.C. 431 *et seq.* In that context, the

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[2] Petitioner contends (Br. 40-42) that the Court in *Havens Realty* found Article III requirements to be satisfied because the tester "was the direct victim of [racial] discrimination." Br. 41. That assertion is inconsistent with the Court's *ratio decidendi*, which rested on the invasion of a statutory right to accurate information, even though no other adverse consequence had been identified. The Court specifically rejected the tester's asserted consequential injuries as bases for standing. 455 U.S. at 376-377.

Court has held that plaintiffs establish an "injury in fact" by showing an "inability to obtain information * * * that, on [their] view of the law, the statute requires [to be] ma[de] public." *Akins*, 524 U.S. at 11, 21.[3]

In *Zivotofsky* v. *Secretary of State*, 444 F.3d 614, 617-619 (2006), the D.C. Circuit reversed the district court by holding that Zivotofsky, a U.S. citizen born in Jerusalem, had Article III standing to challenge the government's refusal to identify "Israel" (rather than "Jerusalem") as his place of birth on his passport. Although Zivotofsky alleged no difficulty using his passport and was too young to allege any nonspeculative psychological or other harm, *id.* at 617 & n.3, the D.C. Circuit concluded that federal courts had Article III power to adjudicate his claim. The court explained that Congress had granted Zivotofsky a statutory right to have "Israel" listed on his passport, and that this Court's decisions had repeatedly based standing on the invasion of a plaintiff's own statutory right, "even though no injury would exist without the statute." *Id.* at 617-619 (citation omitted). When this Court considered *Zivotofsky*, both of its decisions noted the divergent standing holdings of the courts below. Perhaps because the proper resolution of the standing issue seemed clear, the Court did not specifically address its Article III jurisdiction before holding

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[3] Petitioner contends (Br. 42-44) that standing to bring FOIA, FACA, and FECA actions rests on the "*effects* on the plaintiffs of the denial of access." Although some plaintiffs whose requests for information are denied may suffer further consequential harm as a result, the Court has treated the government's "deni[al of their] requests for information" as the "distinct injury [that] provide[s] standing." *Public Citizen*, 491 U.S. at 449.

that "Zivotofsky's claim presents issues the Judiciary is competent to resolve" under the political-question doctrine, *Zivotofsky* v. *Clinton*, 132 S. Ct. 1421, 1426, 1430 (2012), and resolving that claim on the merits, *Zivotofsky* v. *Kerry*, 135 S. Ct. 2076, 2083, 2096 (2015).

B. The Court's Development Of The Injury-In-Fact Requirement Confirms That Standing May Rest On The Invasion Of A Plaintiff's "Legally Protected Interest"

The decisions resting Article III standing on the invasion of a plaintiff's legally protected interest reflect the doctrinal development of the "injury in fact" requirement, which *expanded* the categories of judicially cognizable injuries beyond those attributable to the violation of a legal right.

The Court first articulated the injury-in-fact requirement in *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150, 152 (1970) (*ADPSO*), and *ADPSO*'s companion case, *Barlow* v. *Collins*, 397 U.S. 159, 163 (1970). Before those decisions, standing to challenge governmental action had been limited to plaintiffs who could establish a "legal right—one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege"—that was "invaded" by the challenged action. See, *e.g.*, *Tennessee Elec. Power Co.* v. *TVA*, 306 U.S. 118, 137-138 (1939). By 1970, however, the Court concluded that the "trend [wa]s toward enlargement of the class of people who may protest administrative action." *ADPSO*, 397 U.S. at 154. The Court explained that the standing inquiry should turn on whether "the challenged action has caused [the plaintiff] injury in fact, economic or otherwise." *Id.* at 152. When the Court next addressed the "injury in fact" require-

ment, it confirmed that *ADPSO* and *Barlow* had expanded the scope of standing to seek judicial review of agency action from the Court's earlier, exclusive focus on the existence of a "legal interest" or "legal wrong," by "h[o]ld[ing] more broadly" that judicial review is available when plaintiffs show that a "challenged action had caused them 'injury in fact.'" *Sierra Club* v. *Morton*, 405 U.S. 727, 733 (1972); see *Schlesinger*, 418 U.S. at 218 (*ADPSO* announced a "broaden[ing]" of "the categories of judicially cognizable injury.").

The plaintiff in *Sierra Club* sought to challenge the United States Forest Service's decision to open certain areas within a National Forest to recreational development. 405 U.S. at 728-730. The plaintiff alleged that the planned development would adversely affect the "aesthetics and ecology of the area." *Id.* at 734. The Court held that harm to those interests would suffice to establish the plaintiff's "injury in fact" if, but only if, the plaintiff's members actually used the affected area and therefore would be "among the injured." *Id.* at 734-735. The Court did not suggest that persons who used the area had any *legal* (*e.g.*, property) interest in the land or any *legal* right, not shared by the public generally, to control or influence the area's development. Rather, the Court found it sufficient that such persons would have a distinct *practical* "stake in the outcome." *Id.* at 740.

That expanded conception of judicially cognizable injury, however, did not eliminate the plaintiff's option of establishing Article III standing by demonstrating an invasion of his own legally protected interests. The Court in *Warth* explained that, "[a]lthough standing in no way depends on the merits of the plaintiff's contention that particular conduct is illegal, it

often turns on the nature and source of the claim asserted" because the "injury required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing.'" 422 U.S. at 500 (quoting *Linda R.S.*, 410 U.S. at 617 n.3) (internal citation omitted). Such an invasion of a legally protected right provides a constitutionally sufficient basis for invoking the jurisdiction of an Article III court "even where the plaintiff would have suffered no judicially cognizable injury in the absence of statute." *Id.* at 514.

Since that time, the Court has reiterated that the term "'injury in fact'" can "mean an invasion of a legally protected interest." *Associated Gen. Contractors*, 508 U.S. at 663 (citation omitted); accord, *e.g.*, *Arizona State Legislature* v. *Arizona Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2663 (2015); *United States* v. *Windsor*, 133 S. Ct. 2675, 2685 (2013); *Arizona Christian Sch. Tuition Org.* v. *Winn*, 131 S. Ct. 1436, 1442 (2011); *Defenders*, 504 U.S. at 560. To be sure, the "invasion" will constitute "injury in fact" only if it is actual and concrete; an abstract disagreement as to the scope of the plaintiff's legal rights is insufficient to support Article III jurisdiction. That requirement is satisfied here, however, since respondent has alleged that petitioner's failure to exercise due care resulted in the actual dissemination of inaccurate personal information about respondent. Petitioner identifies no decision of this Court holding that a plaintiff lacked Article III standing to seek relief for an actual violation of his *own* legal rights.

C. Common-Law Courts Have Long Adjudicated Claims Alleging Violations Of A Plaintiff's Legal Rights, Even When The Plaintiff Suffered No Further Consequential Injury

Historical practice "is particularly relevant to the constitutional standing inquiry since * * * Article III's restriction of the judicial power to 'Cases' and 'Controversies' is properly understood to mean 'cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process.'" *Vermont Agency of Natural Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 774 (2000) (quoting *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 102 (1998)). Courts have long entertained actions for damages based on alleged violations of personal rights, even when a plaintiff shows no further consequential injury beyond the invasion of his own legally protected interest. In tort law, for instance, an "injury" is understood to mean an "invasion of a legally protected interest." 1 Restatement (First) of Torts § 7 cmt. a, at 16-17 (1934). And although "[t]he most usual form of injury is tangible harm," a plaintiff can have an "injury" sufficient to "maintain an action" even when "no harm is done" beyond the invasion of the protected interest. *Id.* at 17; see 4 *id.* § 902 cmt. a, at 539 (1939).

1. That principle has deep roots in the Anglo-American legal tradition. "[E]very American statesman at the time the Constitution was adopted" was "undoubtedly familiar" with the well-known trespass decision of *Entick* v. *Carrington*, which stated the established rule that "'no man can set his foot upon his neighbour's close without his leave; [and] if he does he is a trespasser, though he does no damage at all.'" *United States* v. *Jones*, 132 S. Ct. 945, 949 (2012)

(quoting *Entick* v. *Carrington*, (1765) 95 Eng. Rep. 807, 817 (K.B.)) (citations and some internal quotation marks omitted). Blackstone similarly explained that "the law of England * * * has treated every entry upon another's lands * * * as an injury or wrong, for satisfaction of which an action in trespass will lie," and has provided a "general damage" award even "if no other special loss can be assigned." 3 William Blackstone, *Commentaries on the Laws of England* 209-210 (1768) (*Blackstone's Commentaries*). The "wrong for which a remedy is given" in trespass is thus the invasion of the owner's protected "interest in excluding others from the land," which entitles him to at least nominal damages. 1 Restatement (First) of Torts § 163 cmt. d, at 382. The owner may recover for the invasion of that right even if he tangibly "benefits from the trespass, as where the trespasser tears down a worthless building or prepares a field for cultivation." *Ibid.*; accord 1 Restatement (Second) of Torts § 7 cmt. a, at 13 (1965).

The same holds true in contract. "A breach of contract always creates a right of action," and when "no harm was caused by the breach * * * judgment will be given for nominal damages." 1 Restatement (First) of Contracts § 328 & cmt. a, at 502-503 (1932); see, *e.g.*, *Wilcox* v. *Executors of Plummer*, 29 U.S. (4 Pet.) 172, 181-182 (1830); *Marzetti* v. *Williams*, (1830) 109 Eng. Rep. 842, 845 (K.B.) (Lord Tenterden, C.J.) (A plaintiff "is entitled to recover nominal damages" for any breach of contract even "though he may not have sustained a damage in fact" and has not "prove[n] any actual damage at the trial.").

It thus has long been understood that "the right alone was essential" to sustain various common-law

actions, and that "infringements of right" could be asserted without a claim of consequential harm because "damage to the right [was] sufficient to warrant the owner in asserting the right against the party infringing it." *Mayor of London* v. *Mayor of Lynn*, (1796) 126 Eng. Rep. 1026, 1041 (H.L.) (Eyre, C.J.); see J.G. Sutherland, *A Treatise on the Law of Damages* § 9, at 31, 34 (4th ed. 1916). Early in the Nation's history, Chief Justice Marshall echoed Blackstone's description of this colonial-era principle: "'[I]t is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded.'" *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (quoting 3 *Blackstone's Commentaries* 23).[4] Justice Story likewise explained that one of the "elements of the common law" was that it "tolerates no farther inquiry than whether there has been the violation of a right" because "the party injured is entitled to maintain his action for nominal damages, in vindication of his right." *Webb* v. *Portland Mfg. Co.*, 29 F. Cas. 506, 507-508 (C.C.D. Me. 1838) (No. 17,322) (action for harmless diversion of water); see *Whittemore* v. *Cutter*, 29 F. Cas. 1120, 1121 (C.C.D. Mass. 1813) (No. 17,600) (Story, J.) (holding in patent suit for the "mak-

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[4] That general rule is subject to exceptions. For instance, a plaintiff who has Article III standing nevertheless will lack a judicial remedy against the United States unless Congress has enacted a statutory waiver of sovereign immunity. See, *e.g.*, *Department of the Army* v. *Blue Fox, Inc.*, 525 U.S. 255, 260-261 (1999). Congress is also free, when creating new statutory rights, to limit private judicial enforcement to plaintiffs who have suffered some specified type or amount of consequential harm. Even in those contexts, however, the determination whether particular suits can go forward is subject to the control of Congress.

ing of a[n infringing] machine" that "[e]very violation of a right imports some damage, and if none other be proved, the law allows a nominal damage").

Common-law courts thus have traditionally awarded "nominal" damages against "a wrongdoer who has caused no harm" if he "has invaded an interest of the plaintiff protected against non-harmful conduct." 4 Restatement (First) of Torts § 907 cmts. a & b, at 552; accord 4 Restatement (Second) of Torts § 907 cmt. b, at 463 (1979). Such nominal awards have long been deemed appropriate to "vindicate[] deprivations of certain 'absolute' rights that are not shown to have caused actual injury." *Carey* v. *Piphus*, 435 U.S. 247, 266 (1978); see *Farrar* v. *Hobby*, 506 U.S. 103, 112 (1992); Dan B. Dobbs, *Handbook on the Law of Remedies* § 3.8, at 191-192 (1st ed. 1973) (Nominal damages are available to "vindicate and judicially establish a right * * * even if no harm is done.").

2. Petitioner identifies no sound reason to doubt that plaintiffs at common law could recover (at least nominal) damages to vindicate invasions of various legal rights. Although petitioner asserts (Br. 20-21) that a "violation of a legal right" without some other "concrete harm" was never sufficient to support a cause of action "[i]n the English legal tradition," the decisions on which petitioner relies show only that *certain* actions required a separate showing of harm.

Petitioner notes (Br. 23), for instance, that a commoner—*i.e.*, an individual with a right to pasture livestock on the commons—was required to prove both "*injuria* (legal injury) and *damnum* (damage)" in a damages action for "overgrazing of the common." But because a commoner's right was a non-exclusive one, the common law treated it differently than a

landowner's absolute right to exclude others, the bare invasion of which supported an action of trespass to land (*trespass quare clausum fregit*). See pp. 19-20, *supra*. Petitioner's own citations indicate as much. See, *e.g.*, *Robert Marys's Case*, (1613) 77 Eng. Rep. 895, 898-899 (K.B.) (concluding that a commoner will not have an action "if the trespass be so small, that he has not any loss" from another's overfeeding on the common, but that "the lord of the soil shall have an action for trespass" because the act of entry is "an immediate trespass to him").

Petitioner similarly attempts (Br. 26) to distinguish the nominal damages awarded for any breach of contract and the disgorgement relief granted for breaches of trust (which require no showing of harm) on the ground that such suits provide a remedy only because they involve the "loss of a bargain or breach of trust." But if a particular breach of one's right to the fulfillment of a promise or trust obligation results in no other adverse real-world consequences, it is materially indistinguishable from the violation of one's own statutory right to (for example) avoid dissemination of inaccurate information about oneself. In each context, the cognizable harm is a concrete deprivation of a legally protected right specific to the plaintiff. And because common-law courts traditionally adjudicated various forms of damages actions to redress an invasion of a plaintiff's own rights even when the invasion resulted in no other real-world harm, the Framers would have expected the Article III power of federal courts to extend to similar actions to vindicate personal rights later established by federal law.

D. Because Respondent's Suit Alleges A Violation Of His Own Statutory Rights, And Because His Allegation That Petitioner Disseminated False Information About Him Is Closely Analogous To A Common-Law Defamation Claim, Adjudicating The Suit Would Accord With Traditional Understandings Of The Judicial Role

1. The common-law authorities discussed above establish only that, in various circumstances, a plaintiff could sue for violations of his *own* legal rights, without alleging or proving further consequential harm arising from the violation. Those authorities do not suggest, for example, that every member of the public could sue to complain of a trespass onto a stranger's land. That longstanding conception of the judicial role implies meaningful limits on Congress's power to authorize private suits to redress statutory violations.

For purposes of the established rule that private plaintiffs can seek judicial redress for violations of their own legal rights, Congress could not simply declare that every member of the public has a judicially enforceable "right" to general compliance with a particular statutory command, since "the public interest in proper administration of the laws" cannot "be converted into an individual right by a statute that denominates it as such." *Defenders*, 504 U.S. at 576. Congress likewise could not confer a right to sue on an arbitrarily selected "subclass of citizens who suffer no distinctive concrete harm" apart from the harm shared by the general population. *Id.* at 577. Thus, Congress could not constitutionally have authorized respondent to sue for an alleged FCRA violation that had no concrete and particularized connection to him. But where Congress determines that a specified class

of persons should be regarded as victims of a particular type of statutory violation, that legislative determination should be given substantial weight in the Article III analysis.

FCRA's authorization of private suits is consistent with those principles, both in general and on the facts of this case. By providing that "[a]ny person who willfully fails to comply with any requirement imposed under [FCRA] with respect to any consumer is liable to *that consumer*," 15 U.S.C. 1681n(a) (emphasis added), the statute requires a concrete and particularized link between the plaintiff and the alleged violation. And in this case, respondent seeks redress for the alleged written dissemination of false information about respondent himself. Although Congress has ample power to create (and authorize private judicial enforcement of) new statutory rights that have no common-law analog, Congress's power to act is particularly clear when such an analog exists. Allowing respondent's suit to go forward, even without an allegation of further consequential harm resulting from the disclosures, accords with traditional judicial practices in adjudicating common-law actions for written defamation.

2. By the early 1700s, common-law courts had developed a firm distinction between written defamation (libel) and oral defamation (slander), and had sustained actions for libelous statements even though the same "words, if merely spoken[,] would not [have been] of themselves sufficient to support an action." *Thorley* v. *Kerry*, (1812) 128 Eng. Rep. 367, 371 (Exch. Chamber); see W.S. Holdsworth, *Defamation in the Sixteenth and Seventeenth Centuries*, 41 L.Q. Rev. 13, 16-18 (1925). Written defamation was actionable per

se without "evidence of actual loss" because "injury [wa]s presumed from the fact of publication." *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 349 (1974). But courts permitted plaintiffs to recover even if harm could not be presumed, as where the defendant showed that "no loss" or any reputational harm had "actually occurred." *Ibid.*; see 3 Restatement (Second) of Torts § 621 caveat, at 319 (1977) (noting the "traditional common-law rule allowing recovery [for defamation] in the absence of proof of actual harm"); *id.* § 620 & cmt. b, at 317-318 (all written and certain oral defamations are actionable for at least nominal damages). Courts viewed that recovery as "perform-[ing] a vindicatory function," 3 Restatement (First) of Torts § 569 cmt. b, at 166 (1938), and as "a way of recognizing" that such publications "in themselves really are 'damage' or harm," 2 Dan B. Dobbs, *Law of Remedies* § 7.3(2), at 308 (2d ed. 1993). That history is "well nigh conclusive" proof that respondent's claim arising from the publication of false information about him satisfies Article III's requirements. See *Vermont Agency*, 529 U.S. at 777.

3. Petitioner argues (Br. 49-52) that defamation is different because, although common-law courts would award damages without any proof that a defamatory statement diminished the plaintiff's reputation or produced other real-world harms, such damages for defamation per se were available only for certain categories of statements. In petitioner's view, because the false information about respondent that petitioner disseminated is not defamation per se, the common law does not support Article III jurisdiction in this case. That is incorrect. Neither Congress's power to establish new rights nor the jurisdiction of the federal

courts is limited to the specific categories of wrongs that were actionable at common law.

Even in the absence of legislative intervention, common-law courts have long exercised authority to address new problems that arise over time. "The entire history of the development of Tort law," for instance, "shows a continuous tendency to recognize as worthy of legal protection interests which previously were not protected at all." 1 Restatement (First) of Torts § 1 cmt. e, at 4. That expansion of legal rights "meet[s] the demands of society" in the face of "[p]olitical, social, and economic changes." Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193, 193 (1890).

"[B]oth the common law and the literal understandings of privacy," for instance, are now understood to "encompass the individual's control of information concerning his or her person." *Department of Justice* v. *Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 763 (1989); *Department of State* v. *Ray*, 502 U.S. 164, 175 (1991) (noting the "privacy interest" of named individuals in avoiding public disclosure of their "personal information regarding marital and employment status"). That interest is particularly salient given the modern proliferation of large databases and the ease and rapidity of Internet transmissions, since "[t]he capacity of technology to find and publish personal information * * * presents serious and unresolved issues with respect to personal privacy and the dignity it seeks to secure." *Sorrell* v. *IMS Health Inc.*, 131 S. Ct. 2653, 2672 (2011).

Article III cannot plausibly be read to preclude Congress from exercising the same authority to establish new rights, and to provide effective remedies for

their violation, that common-law courts have traditionally exercised. Congress possesses constitutional authority to "define new legal rights" in new contexts, *Vermont Agency*, 529 U.S. at 773, and thereby to "broaden[]" the "categories of injury that may be alleged in support of standing," *Defenders*, 504 U.S. at 578 (citation omitted). Congress thus possesses "power to define injuries * * * that will give rise to a case or controversy where none existed before," and to establish "new rights of action that do not have clear analogs in our common-law tradition." *Id.* at 580 (Kennedy, J., concurring in part and concurring in the judgment).

In this case, moreover, any deviation from traditional common-law principles is extremely slight. FCRA's authorization of suits for a CRA's publication of inaccurate information in a consumer report is, at the very most, a modest legislative expansion of the circumstances under which the dissemination of inaccurate personal information will be treated as an actionable wrong even without proof of further consequential harm. In this regard, it bears emphasis that CRAs generally are authorized to furnish consumer reports only in specified circumstances where the recipient can be expected to use the report as a basis for some concrete (and often commercial) decision. See 15 U.S.C. 1681b(a)(1)-(6). Congress could reasonably conclude that the inclusion of false information in a report of that character should be treated as a legally cognizable injury to the individual consumer involved, even though the precise nature and extent of any later consequential harms may be difficult to verify in individual cases.

E. Petitioner's Challenges To Respondent's Article III Standing Are Without Merit

1. Petitioner argues (Br. 9) that Article III "requires real-world harm, not just a bare statutory violation." Respondent, however, alleges more than a "bare statutory violation." He alleges that his *own* FCRA rights were violated through the public dissemination of false information about himself. Analogous allegations have long been treated as judicially cognizable, whether or not the plaintiff alleges further consequential injury resulting from the disclosure. See pp. 19-22, 25-26, *supra*.

Under this Court's decisions, a fair-housing "tester" who alleges no harm other than the deprivation of her statutory right to truthful information can bring suit to redress that violation. See pp. 13-14, *supra*. A FOIA requestor who seeks and is denied agency records may bring suit without alleging any harm beyond the denial of his request. See p. 14, *supra*. The principles behind such decisions apply equally in other contexts involving individuals' statutory rights. Allowing respondent to seek redress for unlawful dissemination of false information about himself therefore is consistent with the established understanding that the "province of the court * * * is, solely, to decide on the rights of individuals." *Defenders*, 504 U.S. at 576 (quoting *Marbury*, 5 U.S. (1 Cranch) at 170).

2. Contrary to petitioner's contention (Br. 28-31, 39), treating suits like this one as judicially cognizable would not permit Congress to transfer Executive power to private actors. A plaintiff who seeks relief for a violation of his *own* statutory rights, involving conduct that is directly and substantially connected to him, does not perform an executive function. Such

private suits are the traditional means by which individuals enforce their own legal rights.

3. Petitioner suggests (Br. 32-35) that the Court's Article III analysis should account for respondent's assertion of putative class claims. But the only question presented in this Court concerns a *single* individual's injury-in-fact. Pet. i. The Court's resolution of that question will control future individual actions, including suits seeking only equitable relief to halt ongoing, unlawful conduct. See *Summers*, 555 U.S. at 493 ("To seek injunctive relief, a plaintiff must show that he is under threat of suffering [an] 'injury in fact.'"). Under petitioner's theory, Congress cannot authorize federal courts to enjoin the continued dissemination for commercial purposes of demonstrably inaccurate personal information about a plaintiff unless the plaintiff establishes that further consequential injury is imminent. Such a dramatic restriction of the federal courts' equitable powers is unsupported by this Court's precedents.

If respondent's allegations are otherwise sufficient to establish a "case" or "controversy" in light of the remedial scheme that Congress has created, neither the possibility of class treatment, nor the potential magnitude of the recovery that a successful class action might produce, bears on the Judiciary's Article III power to adjudicate respondent's suit. If a class is certified, petitioner will be free to litigate "whether principles of due process and other doctrines that protect against excessive awards" should limit the amount of aggregate statutory damages that a class

could recover. *Maracich* v. *Spears*, 133 S. Ct. 2191, 2209 (2013).[5]

F. The Court's Article III Analysis Should Focus On Respondent's Principal Claim under 15 U.S.C. 1681e(b)

1. The court of appeals focused on respondent's claim that petitioner had violated Section 1681e(b) by "publishing inaccurate personal information about him[]" in its consumer report. Pet. App. 1a. The court correctly held that respondent had standing to pursue that claim. In addition to the claim that the court below directly addressed, however, respondent has asserted claims based on petitioner's alleged failure to give persons that regularly furnish it information notice of their responsibilities (15 U.S.C. 1681e(d)(1)(A)); to give required notices to, and obtain required certifications from, the persons to whom petitioner provides consumer reports (15 U.S.C. 1681b(b)(1), 1681e(d)(1)(B)); and to post a toll-free number on its website for consumers seeking a free annual report (12 C.F.R. 1022.137(a)(1)). See J.A. 20-23. The court of appeals did not address, on a claim-by-claim basis, whether respondent had standing to bring those claims as well.

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[5] Petitioner also argues (Br. 53-56) that the Court should interpret FCRA's private right of action for certain willful FCRA violations, 15 U.S.C. 1681n(a), as requiring proof of consequential harm. That argument is not fairly encompassed within the question presented, however, and petitioner's statutory argument is in any event implausible. The relevant provision states that "[a]ny person who willfully fails to comply with any requirement imposed under [FCRA] with respect to any consumer is liable to that consumer" for actual or statutory damages. *Ibid.* Nothing in that language suggests that the plaintiff consumer must allege or prove further consequential harm.

This case reached the court below, however, on an appeal from the district court's determination that respondent's failure adequately to allege consequential harm from petitioner's inaccurate disclosures required dismissal of respondent's complaint *in its entirety*. See Pet. App. 23a-24a. In litigating the question whether that disposition was appropriate, the parties did not urge the court of appeals to analyze the various claims separately. Even in this Court, petitioner limits its discussion of respondent's other FCRA claims to a three-sentence footnote and a single-sentence paragraph. See Br. 40 n.7, 50. If this Court affirms the court of appeals' determination that respondent has standing to pursue his false-information claim, the courts below can analyze on remand whether respondent satisfies Article III requirements with respect to his remaining allegations. Cf. *M&G Polymers USA, LLC* v. *Tackett*, 135 S. Ct. 926, 937 (2015) ("This Court is one of final review, not of first view.") (citation omitted).

2. As an adjunct to the creation of substantive statutory rights, Congress often authorizes private suits to be filed by classes of persons whom the proscribed conduct has a natural tendency to injure. Many such laws, however, do not require proof that the feared consequential harms have actually materialized in a particular case, but rather allow awards of statutory damages to plaintiffs who establish a deprivation of the statutory right itself but do not prove any further consequential injury. For example, federal copyright law has long authorized awards of statutory damages to copyright holders in the absence of proof of any harm other than infringement. See 17 U.S.C. 504(a) and (c); *Feltner* v. *Columbia Pictures Television, Inc.*, 523 U.S. 340, 351

(1998) (discussing Copyright Act of 1790, ch. 15, 1 Stat. 124, and its predecessors).[6]

Petitioner's contention that consequential harm must be alleged and proved in each suit represents a frontal assault on that longstanding mode of enforcement. To be sure, Article III places meaningful limits on Congress's ability to treat particular classes of persons as the victims of particular statutory violations. See pp. 11-12, *supra*. Thus, although Congress has broad authority to enact statutory-damages provisions like those described above, the constitutionality of such provisions cannot appropriately be determined through a per se rule either for or against their validity. Congress did not venture close to the constitu-

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[6] See also, *e.g.*, 15 U.S.C. 1117(c) (statutory damages for use of counterfeit marks); 15 U.S.C. 1679g(a)(1)(B) (statutory refund of amount paid to organization that violates Credit Repair Organizations Act); 15 U.S.C. 1693m(a)(2) (statutory damages for failing to comply with any provision of Electronic Fund Transfer Act with respect to a consumer); 17 U.S.C. 911(c) (statutory damages for infringement of semiconductor chip mask work); 18 U.S.C. 2710(b) and (c)(2)(A) (liquidated damages for knowing disclosure of personally identifiable information by videotape service provider); 18 U.S.C. 2724(a) and (b)(1) (statutory damages for knowingly obtaining, disclosing, or using personal information from a motor vehicle record for purposes not permitted by statute); 29 U.S.C. 1821(a) and (b), 1831(a) and (b), 1843, 1854(c)(1) (statutory damages for intentional violations of Migrant and Seasonal Agricultural Worker Protection Act, including by failing to provide written disclosures to a migrant or seasonal agricultural worker at the time of his recruitment and by failing to display posters specifying workers' rights); 47 U.S.C. 227(b)(1)(A)(iii), (B), and (3)(B) (statutory damages for violations of the Telephone Consumer Protection Act of 1991, including by making an automatically dialed or prerecorded call to a cell phone or making a prerecorded call to a residence without consent); 47 U.S.C. 605(a) and (e)(3)(C)(i)(II) (statutory damages for unlawful disclosure of wire or radio communication).

tional line, however, in providing a statutory-damages remedy for the public dissemination of inaccurate personal information about the plaintiff himself. It was clearly reasonable for Congress to treat respondent as the victim of that violation, and analogous wrongs have long been redressable at common law without proof of further consequential harm.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. 15 U.S.C. 1681a provides in pertinent part:

Definitions; rules of construction

* * * * *

(d) CONSUMER REPORT.—

(1) IN GENERAL.—The term "consumer report" means any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for—

(A) credit or insurance to be used primarily for personal, family, or household purposes:

(B) employment purposes; or

(C) any other purpose authorized under section 1681b of this title.

(2) EXCLUSIONS.—Except as provided in paragraph (3), the term "consumer report" does not include—

(A) subject to section 1681s-3 of this title, any—

(i) report containing information solely as to transactions or experiences between the consumer and the person making the report;

(ii) communication of that information among persons related by common ownership or affiliated by corporate control; or

(iii) communication of other information among persons related by common ownership or affiliated by corporate control, if it is clearly and conspicuously disclosed to the consumer that the information may be communicated among such persons and the consumer is given the opportunity, before the time that the information is initially communicated, to direct that such information not be communicated among such persons;

(B) any authorization or approval of a specific extension of credit directly or indirectly by the issuer of a credit card or similar device;

(C) any report in which a person who has been requested by a third party to make a specific extension of credit directly or indirectly to a consumer conveys his or her decision with respect to such request, if the third party advises the consumer of the name and address of the person to whom the request was made, and such person makes the disclosures to the consumer required under section 1681m of this title; or

(D) a communication described in subsection (*o*) or (x)[1] of this section.

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[1] See References in Text note below.

(3) RESTRICTION ON SHARING OF MEDICAL INFORMATION.—Except for information or any communication of information disclosed as provided in section 1681b(g)(3) of this title, the exclusions in paragraph (2) shall not apply with respect to information disclosed to any person related by common ownership or affiliated by corporate control, if the information is—

(A) medical information;

(B) an individualized list or description based on the payment transactions of the consumer for medical products or services; or

(C) an aggregate list of identified consumers based on payment transactions for medical products or services.

* * * * *

(f) The term "consumer reporting agency" means any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports.

* * * * *

2. 15 U.S.C. 1681e provides in pertinent part:

Compliance procedures

(a) Identity and purposes of credit users

Every consumer reporting agency shall maintain reasonable procedures designed to avoid violations of section 1681c of this title and to limit the furnishing of consumer reports to the purposes listed under section 1681b of this title. These procedures shall require that prospective users of the information identify themselves, certify the purposes for which the information is sought, and certify that the information will be used for no other purpose. Every consumer reporting agency shall make a reasonable effort to verify the identity of a new prospective user and the uses certified by such prospective user prior to furnishing such user a consumer report. No consumer reporting agency may furnish a consumer report to any person if it has reasonable grounds for believing that the consumer report will not be used for a purpose listed in section 1681b of this title.

(b) Accuracy of report

Whenever a consumer reporting agency prepares a consumer report it shall follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates.

* * * * *

3. 15 U.S.C. 1681n provides:

Civil liability for willful noncompliance

(a) In general

Any person who willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of—

(1)(A) any actual damages sustained by the consumer as a result of the failure or damages of not less than $100 and not more than $1,000; or

(B) in the case of liability of a natural person for obtaining a consumer report under false pretenses or knowingly without a permissible purpose, actual damages sustained by the consumer as a result of the failure or $1,000, whichever is greater;

(2) such amount of punitive damages as the court may allow; and

(3) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

(b) Civil liability for knowing noncompliance

Any person who obtains a consumer report from a consumer reporting agency under false pretenses or knowingly without a permissible purpose shall be liable to the consumer reporting agency for actual damages sustained by the consumer reporting agency or $1,000, whichever is greater.

(c) Attorney's fees

Upon a finding by the court that an unsuccessful pleading, motion, or other paper filed in connection with an action under this section was filed in bad faith or for purposes of harassment, the court shall award to the prevailing party attorney's fees reasonable in relation to the work expended in responding to the pleading, motion, or other paper.

(d) Clarification of willful noncompliance

For the purposes of this section, any person who printed an expiration date on any receipt provided to a consumer cardholder at a point of sale or transaction between December 4, 2004, and June 3, 2008, but otherwise complied with the requirements of section 1681c(g) of this title for such receipt shall not be in willful noncompliance with section 1681c(g) of this title by reason of printing such expiration date on the receipt.

4. 15 U.S.C. 1681*o* provides:

Civil liability for negligent noncompliance

(a) In general

Any person who is negligent in failing to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of—

(1) any actual damages sustained by the consumer as a result of the failure; and

(2) in the case of any successful action to enforce any liability under this section, the costs of the action

together with reasonable attorney's fees as determined by the court.

(b) Attorney's fees

On a finding by the court that an unsuccessful pleading, motion, or other paper filed in connection with an action under this section was filed in bad faith or for purposes of harassment, the court shall award to the prevailing party attorney's fees reasonable in relation to the work expended in responding to the pleading, motion, or other paper.

REPLY BRIEF

Supreme Court, U.S.
FILED
JUL 9 - 2015
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No. 13-1339

Supreme Court of the United States

SPOKEO, INC.,

Petitioner,

v.

THOMAS ROBINS, individually and on behalf of all others similarly situated,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF OF ACA INTERNATIONAL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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Table of Contents

Page

Table of Cited Authorities ii

Interest of the *Amicus Curiae* 1

Summary of Argument 3

Argument 5

I. The statute at issue is one of a class of statutes that creates liability without requiring injury in fact. 5

II. This case's implications go beyond the statute at issue, and affect the credit-and-collection industry at every level. 12

III. Standing is a fixed constitutional principle that Congress cannot expand by statute. 14

IV. The court below, and other courts that have upheld liability against a defendant without injury to the plaintiff, did not adequately consider the standing requirement's constitutional dimensions. 16

Conclusion 19

Table of Cited Authorities

Cases

Alston v. Countrywide Fin. Corp.,
585 F.3d 753 (3d Cir. 2009) 19

Baker v. G.C. Servs. Corp.,
677 F.2d 775 (9th Cir. 1982) 16

Beaudry v. TeleCheck Servs., Inc.,
579 F.3d 702 (6th Cir. 2009) 16

Carroll v. Wolpoff & Abramson,
53 F.3d 626 (4th Cir. 1995) 16

Charvat v. Mut. First Fed. Credit Union,
725 F.3d 819 (8th Cir. 2013) 18

City Select Auto Sales, Inc. v. David Randall Assocs.,
296 F.R.D. 299 (D.N.J. 2013) 12

David v. Alphin,
704 F.3d 327 (4th Cir. 2013) 19

Edwards v. First Am. Corp.,
610 F.3d 514 (9th Cir. 2010) 16, 19

Gladstone, Realtors v. Village of Bellwood,
441 U.S. 91 (1979) 16

Golan v. Veritas Entm't, LLC,
No. 4:14CV000069 ERW, 2014 U.S. Dist. LEXIS 68910 (E.D. Mo. May 20, 2014), *rev'd*, No. 14-2484, 2015 U.S. App. LEXIS 9489 (8th Cir. June 8, 2015) 12

Harper v. Better Bus. Servs., Inc.,
961 F.2d 1561 (11th Cir. 1992) 16

Horne v. Flores,
557 U.S. 433 (2009) 14

Keele v. Wexler,
149 F.3d 589 (7th Cir. 1998) 16, 18

Kendall v. Employees Ret. Plan of Avon Prods.,
561 F.3d 112 (2d Cir. 2009) 19

Linda R.S. v. Richard D.,
410 U.S. 614 (1973) 15

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992) 14, 15

Mahoney v. Wash. Mut., Inc. (In re Mahoney),
368 B.R. 579 (Bankr. W.D. Tex. 2007) 10

Raines v. Byrd,
521 U.S. 811 (1997) 16

Robey v. Shapiro, Marianos & Cejda, LLC,
434 F.3d 1208 (10th Cir. 2006) 18

Sierra Club v. Morton,
405 U.S. 727 (1972) 15

Simon v. E. Ky. Welfare Rights Org.,
426 U.S. 26 (1976) 14

Summers v. Earth Island Inst.,
555 U.S. 488 (2009) 15

United States v. SCRAP,
412 U.S. 669 (1973) 15

Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc., 454 U.S. 464 (1982) 15

Warth v. Seldin, 422 U.S. 490 (1975) 14, 15

Statutes

15 U.S.C. § 1640(a) 13

15 U.S.C. § 1681n(a) 12

15 U.S.C. § 1692(a) 7

15 U.S.C. § 1692(b) 7

15 U.S.C. § 1692(e) 7

15 U.S.C. § 1692b–92g 8

15 U.S.C. § 1692d(5) 8

15 U.S.C. § 1692k(a) 13

47 U.S.C. § 227(b)(1) 11

47 U.S.C. § 227(b)(3)(B) 13

Consumer Credit Protection Act, Pub. L. No. 90-321, 82 Stat. 176 (1968) (codified at 15 U.S.C. ch. 41) 6, 7

Electronic Fund Transfer Act, Pub. L. No. 95-630, tit. XX, 92 Stat. 3641, 3728 6

ERISA 19

Fair Credit Reporting Act 6, 12

Fair Debt Collection Practices Act ..... *passim*

RESPA 16, 19

Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (1991) (codified at 47 U.S.C. § 227) 7, 11, 13

Truth in Lending Act 13

Other Authorities

Restatement of Torts 6

Restatement (Second) of Torts § 652B cmt. d, illus. 8 (1977) 7

BRIEF OF ACA INTERNATIONAL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER AND REVERSAL

Interest of the *Amicus Curiae*[1]

ACA International, the Association of Credit and Collection Professionals, is a not-for-profit corporation based in Minneapolis, Minnesota. Founded in 1939, ACA brings together nearly 3,400 member organizations and their more than 300,000 employees worldwide, including third-party collection agencies, asset buyers, attorneys, creditors, and vendor affiliates. ACA produces a wide variety of products, services, and publications, including educational and compliance-related information; and articulates the value of the credit-and-collection industry to businesses, policymakers, and consumers. ACA regularly files briefs as an amicus curiae in cases of interest to its membership.

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[1]No counsel for any Party authored this brief in whole or in part. Neither any such counsel nor any Party made a monetary contribution intended to fund this brief's preparation or submission. No person (other than Amicus Curiae ACA International, its members, and its counsel) made such a monetary contribution.

All the Parties have granted their written consent under Rule 37.3(a) for ACA International to file an *amicus curiae* brief.

ACA's members include sole proprietorships, partnerships, and corporations ranging from small businesses to firms that employ thousands of workers. These members include the very smallest of businesses, which operate within a limited geographic range of a single state; and the very largest of multinational corporations, which operate in every state and outside the United States. About three-quarters of ACA's company members have fewer than 25 employees. ACA helps its members serve their communities and meet the challenges created by changing markets through leadership, education, and service.

Through their attempts to recover outstanding accounts, ACA's members act as an extension of every community's businesses. ACA's members represent the local hardware store, the retailer down the street, and the family doctor. They work with these businesses, large and small, to obtain payment for the goods and services received by consumers, and each year, their combined effort results in the recovery of billions of dollars that are returned to businesses and reinvested in local communities. Without an effective collection process, these businesses' economic viability — and, by extension, the local and national economies in general — are threatened. At the very least, absent effective collections, consumers would be forced to pay more for their purchases to compensate for uncollected debts.

Finally, ACA's members also help governments in recovering unpaid obligations — a function that is increasingly important as many governments face record budget deficits.

Summary of Argument

The statute at issue is one of a class of statutes that creates liability without requiring injury in fact. Consumer credit protection is a field that Congress has regulated extensively in the last several decades, beginning with the Consumer Credit Protection Act in 1968. Many consumer-credit statutes created private rights of action to redress injuries for which there was no adequate remedy at common law. But sometimes the remedies that Congress devised for the practices that it prohibited have gone beyond the harms that Congress was trying to address. More to the point, Congress sometimes enacted laws that have been interpreted to provide remedies to plaintiffs who were never harmed at all.

This case's implications go beyond the statute at issue, and affect the credit-and-collection industry at every level. The Fair Credit Reporting Act is far from the only consumer-protection statute that provides for statutory damages independent of whether the plaintiff suffered actual damages. These statutes affect the credit-and-collection industry, daily, and at every level, from the issuance of credit to the collection of debt in default.

ACA therefore joins the Petitioner in asking that this Court reverse the Court of Appeals' judgment.

Standing is a fixed constitutional principle that Congress cannot expand by statute. Congress can enact statutes that create new rights, and Congress can create remedies for those rights. But Congress cannot abrogate the constitutional principle of standing altogether: "broadening the categories of injury that may be alleged in support of standing is a different matter from abandoning the requirement that the party seeking review must himself have suffered an injury." That requirement of injury in fact — "that the party seeking review be himself among the injured" — is an "irreducible constitutional minimum" without which a federal court lacks jurisdiction.

Several federal courts of appeals have allowed plaintiffs to recover statutory damages under consumer-protection statutes without any proof of actual damages — that is, they have let the plaintiffs recover for an injury in law without having suffered an injury in fact. A statute may be "blind when it comes to distinguishing between plaintiffs who have suffered actual damages and those who have not," but the Constitution is not. Most courts of appeals that have upheld liability against a defendant without injury to the plaintiff did not even consider the standing requirement's constitutional dimensions. Other courts of appeals that have considered the constitutional issue have concluded that a statutory violation confers constitutional standing. Yet other courts of appeals

have delved adequately into this Court's standing jurisprudence and correctly held that an uninjured plaintiff lacks constitutional standing.

The credit-and-collection industry operates in a nationwide market, and thus depends on the consistent and predictable application of the federal laws that apply to the issuance of credit and the collection of unpaid debt. But the inconsistent approaches that the courts of appeals have taken have frustrated the consistent and predictable application of the relevant federal laws, and have subjected the credit-and-collection industry to constitutionally unwarranted liability in several jurisdictions. This Court should resolve the various approaches that the courts of appeals have taken, and insist upon consideration of the standing requirement's constitutional dimensions. This Court should therefore reverse the Court of Appeals' judgment.

Argument

I. The statute at issue is one of a class of statutes that creates liability without requiring injury in fact.

Consumer credit protection is a field that Congress has regulated extensively in the last several decades, beginning with the Consumer

Credit Protection Act in 1968.[2] Since its original enactment, the Consumer Credit Protection Act has been amended dozens of times, and many of those amendments are very familiar to most federal courts because they have been so heavily litigated — among them the the Fair Debt Collection Practices Act;[3] the Electronic Fund Transfer Act;[4] and the Fair Credit Reporting Act,[5] the statute at issue in this case.

Many consumer-credit statutes created private rights of action to redress injuries for which there was no adequate remedy at common law. For example, the Restatement of Torts is both clear and explicit that an unwanted communication in an attempt to collect a debt is not an invasion of privacy, even where the creditor knows that the communication is unwanted: "A, a landlord, calls upon B, his tenant, at nine o'clock on Sunday morning, to demand payment of the rent, although he knows that B is not ready to pay it and that B

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[2]Pub. L. No. 90-321, 82 Stat. 176 (1968) (codified at 15 U.S.C. ch. 41).

[3]Pub. L. No. 95-109, 91 Stat. 874 (1977) (codified at 15 U.S.C. ch. 41, subch. V).

[4]Pub. L. No. 95-630, tit. XX, 92 Stat. 3641, 3728, *in* Financial Institutions Regulatory & Interest Rate Control Act of 1978 (codified at 15 U.S.C. ch. 41, subch. VI).

[5]Pub. L. No. 91-508, 84 Stat. 1127 (1970) (codified at 15 U.S.C. ch. 41, subch. III).

objects to such a visit on Sunday. B is seriously annoyed. This is not an invasion of B's privacy."[6] When Congress enacted the Fair Debt Collection Practices Act in 1977, it found that "[t]here is abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors,"[7] but that "[e]xisting laws and procedures for redressing these injuries are inadequate to protect consumers."[8] Congress passed the Fair Debt Collection Practices Act both "to eliminate abusive debt collection practices by debt collectors" and "to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged."[9]

Likewise, when Congress enacted the Telephone Consumer Protection Act of 1991[10] (which is not a part of the Consumer Credit Protection Act), it found that "[o]ver half the States now have statutes restricting various uses of the telephone for marketing, but telemarketers can

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[6]Restatement (Second) of Torts § 652B cmt. d, illus. 8 (1977).

[7]15 U.S.C. § 1692(a) (abusive practices).

[8]15 U.S.C. § 1692(b) (inadequacy of laws).

[9]15 U.S.C. § 1692(e) (purposes).

[10]Pub. L. No. 102-243, 105 Stat. 2394 (1991) (codified at 47 U.S.C. § 227).

evade their prohibitions through interstate operations; therefore, Federal law is needed to control residential telemarketing practices."[11] Congress also found that "[i]ndividuals' privacy rights, public safety interests, and commercial freedoms of speech and trade must be balanced in a way that protects the privacy of individuals and permits legitimate telemarketing practices."[12]

But sometimes the remedies that Congress devised for the practices that it prohibited have gone beyond the harms that Congress was trying to address. More to the point, Congress sometimes enacted laws that have been interpreted to provide remedies to plaintiffs who were never harmed at all.

The Fair Debt Collection Practices Act, for example, mandates or prohibits conduct by debt collectors "in connection with the collection of any debt" in 43 separate paragraphs, each containing one or more specific mandates or prohibitions.[13] One such prohibition applies to "[c]ausing a telephone to ring or engaging any person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass any person

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[11] *Id.*, § 2(7) (not codified in U.S.C.).

[12] *Id.*, § 2(9) (not codified in U.S.C.).

[13] *See* 15 U.S.C. § 1692b–92g.

at the called number."[14] A person whom a debt collector "engag[es] in telephone conversation repeatedly or continuously" surely has standing to complain of the statutory violation. So would a consumer who had to listen to "a telephone ring . repeatedly or continuously." But what if a debt collector "[c]aus[ed] a telephone to ring repeatedly or continuously," but nobody was home, so nobody heard the telephone? Even if the debt collector was calling "with intent to annoy, abuse, or harass any person at the called number," that intent was fruitless; it calls to mind one federal judge's analysis of why intent is irrelevant without effect (in that case, in connection with the alleged violation of a discharge injunction in bankruptcy):

> A plaintiff proves nothing by proving an intent to violate the discharge injunction as such. Certainly it is relevant to know whether the defendant intended to do the *act* that *constitutes* a violation of the discharge, because, without that intent, an action for contempt would fail. But it is unnecessary to demonstrate an intent to violate the discharge injunction as such.
>
> It is also irrelevant. An example helps to explain why. A creditor, smarting from the write-off of his loan,

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[14] 15 U.S.C. § 1692d(5).

> privately sacrifices a goat to Mercury, the Roman god of merchants, believing devoutly that Mercury will see to it that the debtor repays the creditor in full. The creditor takes no actions to publicize his sacrifice. He has no reason to believe that the debtor believes in Mercury, or cares about goats. Certainly, the sacrifice is an intentional act, and it was subjectively intended to collect the debt. Indeed, it might be easy to show that the creditor, "with malice aforethought," had every intent to violate the dickens out of the bankruptcy discharge. But so what? All the intention in the world would not convert the creditor's sacrifice into "an act to collect, recover, or offset" the debt in question. Intentionally performing a useless and ineffective act cannot violate section 524(a) because a useless and ineffective act will not count as a proscribed act within the meaning of the statute — regardless of the avowed "intent to violate the discharge injunction."[15]

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[15] *Mahoney v. Wash. Mut., Inc. (In re Mahoney)*, 368 B.R. 579, 587 (Bankr. W.D. Tex. 2007) (court's emphasis; citation omitted).

Yet the Fair Debt Collection Practices Act would let a consumer who never heard the phone ring, but who learns about a debt collector's calls long after the fact by looking at his phone records for some totally unrelated purpose, assert a claim under the Act.

Similar issues arise under the Telephone Consumer Protection Act. One of the Act's most frequently litigated provisions says that

> It shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States—
>
> (A) to make any call (other than a call . made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice—
>
> (iii) to any telephone number assigned to a . cellular telephone service [16]

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[16] 47 U.S.C. § 227(b)(1) (prohibitions).

The prohibited act is merely "to make any call" to a cell phone using "any automatic telephone dialing system or an artificial or prerecorded voice," regardless of whether the called party is even aware of the call being made.[17]

II. This case's implications go beyond the statute at issue, and affect the credit-and-collection industry at every level.

The Fair Credit Reporting Act provides for "any actual damages sustained by the consumer as a result of the failure or damages of not less than $100 and not more than $1,000," plus punitive damages, for willful noncompliance.[18] But the Fair Credit Reporting Act is far from the only consumer-protection statute that provides for statutory

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[17] *See, e.g., Golan v. Veritas Entm't, LLC*, No. 4:14CV000069 ERW, 2014 U.S. Dist. LEXIS 68910, at *39 (E.D. Mo. May 20, 2014) ("The sum of [Plaintiffs'] knowledge about their alleged injury was based upon what someone else told them, after the fact."), *rev'd*, No. 14-2484, 2015 U.S. App. LEXIS 9489, *3 (8th Cir. June 8, 2015) (reversing the district court's dismissal "concluding that the Golans did not have standing and were inadequate class representatives"); *City Select Auto Sales, Inc. v. David Randall Assocs.*, 296 F.R.D. 299, 304 (D.N.J. 2013) (certifying class even though named plaintiff "does not presently have any information about, recollection of, or record of the faxes that he received from [defendant]").

[18] 15 U.S.C. § 1681n(a).

damages independent of whether the plaintiff suffered actual damages:

- The Truth in Lending Act provides for "any actual damage sustained by [the plaintiff] as a result of the failure" and for statutory damages based on the finance charge, as well as costs and fees.[19]
- The Fair Debt Collection Practices Act provides for "any actual damage sustained by [the plaintiff] as a result of such failure" and for "such additional damages as the court may allow."[20]
- The Telephone Consumer Protection Act provides for "an action to recover for actual monetary loss from such a violation, or to receive $500 in damages for each such violation, whichever is greater."[21]

These statutes affect the credit-and-collection industry, daily, and at every level, from the issuance of credit to the collection of debt in default.

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[19] 15 U.S.C. § 1640(a).

[20] 15 U.S.C. § 1692k(a).

[21] 47 U.S.C. § 227(b)(3)(B) (private right of action).

III. Standing is a fixed constitutional principle that Congress cannot expand by statute.

Standing is "the threshold question in every federal case, determining the power of the court to entertain the suit."[22] Standing is "an essential and unchanging part of the case-or-controversy requirement of Article III,"[23] and it requires that "a plaintiff must present an injury that is concrete, particularized, and actual or imminent; fairly traceable to the defendant's challenged action; and redressable by a favorable ruling."[24]

Congress can enact statutes that create new rights, and Congress can create remedies for those rights. But Congress cannot abrogate the constitutional principle of standing altogether: "broadening the categories of injury that may be alleged in support of standing is a different matter from abandoning the requirement that the party seeking review must himself have suffered an injury."[25] That requirement of injury in fact — "that the party seeking review be himself among

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[22] *Warth v. Seldin*, 422 U.S. 490, 498 (1975).

[23] *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992), *quoted in Horne v. Flores*, 557 U.S. 433, 445 (2009).

[24] *Horne*, 557 U.S. at 445 (citing *Lujan*, 504 U.S. at 560–61).

[25] *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 39 (1976).

the injured"[26] — is an "irreducible constitutional minimum"[27] without which a federal court lacks jurisdiction: "The Art. III judicial power exists only to redress or otherwise to protect against injury to the complaining party, even though the court's judgment may benefit others collaterally. A federal court's jurisdiction therefore can be invoked only when the plaintiff himself has suffered 'some threatened or actual injury resulting from the putatively illegal action . . . .'"[28] To abandon that requirement "would convert the judicial process into 'no more than a vehicle for the vindication of the value interests of concerned bystanders,'" and the "courts of the United States into judicial versions of college debating forums."[29]

Thus, "the requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute,"[30] and "Congress cannot erase

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[26]*Lujan*, 504 U.S. at 563 (quoting *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972)).

[27]*Id.* at 560.

[28]*Warth v. Seldin*, 422 U.S. 490, 499 (1975) (quoting *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 (1973)).

[29]*Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 473 (1982) (quoting *United States v. SCRAP*, 412 U.S. 669, 687 (1973)).

[30]*Summers v. Earth Island Inst.*, 555 U.S. 488, 497 (2009).

Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing."[31]

IV. The court below, and other courts that have upheld liability against a defendant without injury to the plaintiff, did not adequately consider the standing requirement's constitutional dimensions.

Several federal courts of appeals have allowed plaintiffs to recover statutory damages under consumer-protection statutes without any proof of actual damages — that is, they have let the plaintiffs recover for an injury in law without having suffered an injury in fact.[32] As one such

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[31] *Raines v. Byrd*, 521 U.S. 811, 820 n. 3 (1997) (citing *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979)).

[32] *See, e.g.*, *Edwards v. First Am. Corp.*, 610 F.3d 514, 516–18 (9th Cir. 2010) ("the damages provision in RESPA gives rise to a statutory cause of action whether or not an overcharge occurred"); *Beaudry v. TeleCheck Servs., Inc.*, 579 F.3d 702, 705–07 (6th Cir. 2009) ("The [Fair Credit Reporting] Act does not require a consumer to wait for unreasonable credit reporting procedures to result in the denial of credit or other consequential harm before enforcing her statutory rights."); *Keele v. Wexler*, 149 F.3d 589, 593–94 (7th Cir. 1998); *Carroll v. Wolpoff & Abramson*, 53 F.3d 626, 629 (4th Cir. 1995) (affirming award of statutory damages where plaintiff abandoned claim for actual damages); *Harper v. Better Bus. Servs., Inc.*, 961 F.2d 1561, 1563 (11th Cir. 1992)

court explained in a case under the Fair Debt Collection Practices Act, "The FDCPA does not require proof of actual damages as a precursor to the recovery of statutory damages. In other words, the Act is blind when it comes to distinguishing between plaintiffs who have suffered actual damages and those who have not."[33]

A statute may be "blind when it comes to distinguishing between plaintiffs who have suffered actual damages and those who have not," but the Constitution is not. Most courts of appeals that have upheld liability against a defendant without injury to the plaintiff did not even consider the standing requirement's constitutional dimensions. Other courts of appeals that have considered the constitutional issue have concluded that a statutory violation confers constitutional standing: "Congress may expand the range or scope of injuries that are cognizable for purposes of Article III standing by enacting statutes which create legal rights."[34] Yet

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(affirming award of statutory damages where plaintiff "offered no proof of actual damages"); *Baker v. G.C. Servs. Corp.*, 677 F.2d 775, 780 (9th Cir. 1982) ("no indication in the statute than [an] award of statutory damages must be based on proof of actual damages").

[33]*Keele v. Wexler*, 149 F.3d at 593–94 (citations omitted).

[34]*Robey v. Shapiro, Marianos & Cejda, LLC*, 434 F.3d 1208, 1212 (10th Cir. 2006); *see also Charvat v. Mut. First Fed. Credit Union*, 725 F.3d 819, 823 (8th Cir. 2013)

other courts of appeals have delved adequately into this Court's standing jurisprudence and correctly held that an uninjured plaintiff lacks constitutional standing.[35]

("plaintiffs need not show actual damages, beyond a statutory violation, in order to recover statutory damages"); *Edwards v. First Am. Corp.*, 610 F.3d 514, 517 (9th Cir. 2010) ("we must look to the text of RESPA to determine whether it prohibited Defendants' conduct; if it did, then Plaintiff has demonstrated an injury sufficient to satisfy Article III"); *Alston v. Countrywide Fin. Corp.*, 585 F.3d 753, 755 (3d Cir. 2009) ("Countrywide's invasion of that statutory right, even without a resultant overcharge, was an injury-in-fact for purposes of Article III standing").

[35] *See David v. Alphin*, 704 F.3d 327, 338–39 (4th Cir. 2013) ("Appellants failed to plead that they personally have sustained a concrete and particularized injury-in-fact"); *Kendall v. Employees Ret. Plan of Avon Prods.*, 561 F.3d 112, 121 (2d Cir. 2009) ("While plan fiduciaries have a statutory duty to comply with ERISA . . . , Kendall must allege some injury or deprivation of a specific right that arose from a violation of that duty in order to meet the injury-in-fact requirement.").

Conclusion

The credit-and-collection industry operates in a nationwide market, and thus depends on the consistent and predictable application of the federal laws that apply to the issuance of credit and the collection of unpaid debt. Congress, in enacting consumer-protection statutes, has occasionally recognized both the credit-and-collection industry's national scope and its significant impact on interstate commerce.[36] But the inconsistent approaches that the courts of appeals have taken have frustrated the consistent and predictable application of the relevant federal laws, and have subjected the credit-and-collection industry to constitutionally unwarranted liability in several jurisdictions.

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[36] *See, e.g.*, 12 U.S.C. § 2601(a) ("The Congress finds that significant reforms in the real estate settlement process are needed to insure that consumers throughout the Nation are provided with greater and more timely information on the nature and costs of the settlement process and are protected from unnecessarily high settlement charges caused by certain abusive practices that have developed in some areas of the country."); 15 U.S.C. § 1681(a) ("The banking system is dependent upon fair and accurate credit reporting."); 15 U.S.C. § 1692(d) (interstate commerce) ("Abusive debt collection practices are carried on to a substantial extent in interstate commerce and through means and instrumentalities of such commerce. Even where abusive debt collection practices are purely intrastate in character, they nevertheless directly affect interstate commerce.").

This Court should resolve the various approaches that the courts of appeals have taken, and insist upon consideration of the standing requirement's constitutional dimensions. This Court should therefore reverse the Court of Appeals' judgment.

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REPLY BRIEF

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SPOKEO, INC.,
PETITIONER,
v.
THOMAS ROBINS,
RESPONDENT.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF ALABAMA, COLORADO, MICHIGAN, NEBRASKA, TENNESSEE, WEST VIRGINIA, WISCONSIN, AND WYOMING AS AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

May Congress confer Article III standing upon a plaintiff who suffers no concrete harm, and who therefore could not otherwise invoke the jurisdiction of a federal court, by authorizing a private right of action based on a bare violation of a federal statute?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

INTRODUCTION AND INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 3

ARGUMENT 6

I. The States have a strong interest in ensuring a balanced legal system. 6

A. The *amici* States have borne witness to the magnitude of abuse the class action can invite 7

B. Many states recognized the problem and, together with Congress and the judiciary, implemented reforms 10

II. Lower court decisions weakening the injury-in-fact requirement have upset the balance of our judicial system 12

A. Our Constitution and judicial system create a balance between securing the right of the injured to receive restitution and protecting defendants from abusive litigation 13

B. The statutory-damages class action and the effective elimination of the injury-in-fact requirement have upset the balance 15

C. Weakening the injury-in-fact requirement collapses the standing

analysis and the test for class-action certification 17

III. The Court can restore balance by reiterating that injury in fact requires actual harm 20

A. A proper application of the injury-in-fact requirement will eliminate unfair windfall class actions 21

B. A robust standing requirement helps accomplish, rather than hinders, the goals of statutory-damages laws 24

CONCLUSION 31

TABLE OF AUTHORITIES

Cases

AT&T Mobility LLC v. Concepcion,
131 S. Ct. 1740 (2011) 16

Bateman v. American Multi-Cinema, Inc.,
623 F.3d 708 (9th Cir. 2010) 20

Beegal v. Park W. Gallery,
925 A.2d 684 (N.J. 2007) 11

Benn v. BancBoston,
No. 3:96-CV-0974-J (N.D. Tex. Oct. 4,
1996) 9

BMW of N. Am., Inc. v. Gore,
517 U.S. 559 (1996) 14

Comcast Corp. v. Behrend,
133 S. Ct. 1426 (2013) 12

Compaq Computer Corp. v. Lapray,
135 S.W.3d 657 (Tex. 2004) 11

Coopers & Lybrand v. Livesay,
437 U.S. 463 (1978) 16

Donoghue v. Bulldog Investors Gen. P'ship,
696 F.3d 170 (2d Cir. 2012) 22

Dukes v. Wal-Mart, Inc.,
509 F.3d 1168 (9th Cir. 2007), *rev'd*,
Wal-Mart Stores, Inc. v. Dukes, 131 S.
Ct. 2541 (2011) 7

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544 U.S. 336 (2005) 12

Ex parte Am. Bankers Life Assur. Co. of Fla.,
715 So. 2d 186 (Ala. 1997) 10

Ex parte Citicorp Acceptance Co., Inc.,
715 So. 2d 199 (Ala. 1997) 11

Graham Cnty. Soil & Water Conservation Dist. v. U.S. ex rel. Wilson,
559 U.S. 280 (2010) 14

Hammer v. Sam's E., Inc.,
754 F.3d 492 (8th Cir. 2014) *cert. denied*,
135 S. Ct. 1175 (2015) 22

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470 U.S. 821 (1985) 29

Hoffman et al. v. BancBoston Mortg. Corp.,
No. CV-91-1880 (Ala. Cir. Ct., Jan. 24, 1994) 8

Kamilewicz v. Bank of Boston Corp.,
92 F.3d 506 (7th Cir. 1996) 8, 9

Leysoto v. Mama Mia I., Inc.,
255 F.R.D. 693 (S.D. Fla. 2009) 26

Linda R.S. v. Richard D.,
410 U.S. 614 (1973) 21

Lopez v. KB Toys Retail, Inc.,
No. CV 07-144-JFW (CWx) (C.D. Cal. July 18, 2007) 26, 27

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992) ..... passim

McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,
672 F.3d 482 (7th Cir. 2012) 7

Mitchell v. H & R Block, Inc.,
783 So. 2d 812 (Ala. 2000) 8

Murray v. GMAC Mortg. Corp.,
434 F.3d 948 (7th Cir. 2006) 18, 20

Parker v. Time Warner Entm't Co., L.P.,
331 F.3d 13 (2d Cir. 2003) 27

Phillips Petroleum Co. v. Shutts,
472 U.S. 797 (1985).....14

Raines v. Byrd,
521 U.S. 811 (1997).....24

Ramsey v. Nestle Waters N. Am., Inc. d/b/a Poland Spring Water Co.,
No. 03 CHK 817 (Ill. Cir. Ct., Nov. 5, 2003).....9

Robins v. Spokeo, Inc.,
742 F.3d 409 (9th Cir. 2014) *cert. granted*, 135 S. Ct. 1892 (2015).....17

Safeco Ins. Co. of Am. v. Burr,
551 U.S. 47 (2007).....18

Scott v. Blockbuster Inc.,
No. DI62-535, (Jefferson Cnty., Tex., 2001).....10

Seminole Cnty. v. Tivoli Orlando Assocs. Ltd.,
920 So. 2d 818 (Fla. Dist. Ct. App. 2006).....11

Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co.,
559 U.S. 393 (2010).....16

Sierra Club v. Morton,
405 U.S. 727 (1972).....21

Sony Corp. of Am. v. Universal City Studios, Inc.,
464 U.S. 417 (1984).....14

Standard Fire Ins. Co. v. Knowles,
133 S. Ct. 1345 (2013).....12

Stillmock v. Weis Markets, Inc.,
385 F. App'x 267 (4th Cir. 2010) 15

Summers v. Earth Island Inst.,
555 U.S. 488 (2009).....23

Taylor v. Acxiom Corporation,
No. 2:07-cv-0001 (E.D. Tex. Jan. 4, 2007).....27

Tourgeman v. Collins Fin. Servs., Inc.,
755 F.3d 1109 (9th Cir. 2014).....22

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536 U.S. 915 (2002).....16

Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.,
454 U.S. 464 (1982).....29

Vermont Agency of Natural Res. v. U.S. ex rel. Stevens,
529 U.S. 765 (2000).....15, 29

Wal-Mart Stores, Inc. v. Dukes,
131 S. Ct. 2541 (2011) 12, 18

Warth v. Seldin,
422 U.S. 490 (1975) 21, 22, 23

Statutes

15 U.S.C. § 1681 25

15 U.S.C. § 1692 25

ALA. CODE § 6-5-641 11

COLO. REV. STAT. § 13-20-901 12

GA. CODE ANN. § 9-11-23 12

KAN. STAT. ANN. § 60-223 12

LA. CODE CIV. PROC. ANN. arts. 591-97 11

MO. REV. STAT. § 512.020 12

OHIO REV. CODE ANN. § 2505.02 12

TENN. CODE ANN. § 27-1-125 12

TEX. CIV. PRAC. & REM. CODE § 26.001 et seq. 11

TEX. CIV. PRAC. & REM. CODE § 51.014 12

Rules

FED. R. CIV. P. 23 19

Sup. Ct. R. 37 1

Constitutional Provisions

U.S. CONST. art. III, § 2, cl. 1 14

Legislative History

149 Cong. Rec. 21734 (2003) 25, 26

H.B. 4 (Tex. 2003) 12

H.B. 1027 (Colo. 2003) 12

H.B. 1211 (Mo. 2004) 12

H.B. 1984 (La. 1997) 11

H.B. 2008/S.B. 1522 (Tenn. 2011) 12

H.B. 2764 (Kan. 2004) 12

H.B. 394 (Ohio 1998) 12

H.B. 4, 78 Leg. Reg. Sess. (Tex. 2003) 11

S. Rep. No. 109-14 (Feb. 28, 2005) 10

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Blockbuster Settles Late-fee Suit with Certificate Plan, HOUSTON CHRON., Jan. 13, 2002 10

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SITE SELECTION, TOP TEN BUSINESS CLIMATES (2014) 13

SMALL BUSINESS & ENTREPRENEURIAL COUNCIL, SMALL BUSINESS POLICY INDEX 2014: RANKING THE POLICY MEASURES AND COSTS IMPACTING SMALL BUSINESS AND ENTREPRENEURSHIP (2014) 13

Stateside Assocs., *Class Action Lawsuits in State Courts: A Case Study in Alabama* (1998) (attached to Statement of Dr. John B. Hendricks at Mass Torts and Class Actions: Hearings Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary, 105th Cong. (Mar. 5, 1998)) 8

Susan P. Koniak & George M. Cohen, *Under Cloak of Settlement*, 82 VA. L. REV. 1051 (1996) 9

INTRODUCTION AND INTEREST OF AMICI CURIAE

The *amici curiae* are States concerned that lower court decisions have upset the balance between providing injured parties access to the courts and ensuring that businesses are not faced with abusive, no-harm lawsuits.[1] By eliminating the injury-in-fact requirement of standing, these decisions have unleashed a torrent of potentially firm-killing class actions for technical statutory violations that have caused no actual harm to plaintiffs. This Court should reaffirm that actual harm is necessary to establish Article III standing and restore a balance that respects the interests of both consumers and businesses.

The experience of the *amici* States demonstrates the need for balance in our system of civil litigation. In response to widespread abuse of the class action, many of the *amici* States, working with Congress and the courts, have enacted thoroughgoing reforms of class action litigation designed to eliminate abuse while maintaining a vehicle to redress widespread injuries. The lower court's decision undermines the standing requirements of Article III and threatens to return us to the "bad old days" of class-action abuse, where lawyer-driven actions were designed to produce large fees rather than to make injured parties whole.

By all but eliminating its core component—injury in fact—the lower court's decision strips standing of

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[1] The *amici* States do not need consent of the parties to file this brief. *See* Sup. Ct. R. 37(4).

its constitutional role as the "essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Equating injury in fact with technical statutory violations, named plaintiffs can drive classes numbering in the millions. These actions often seek billions or even trillions of dollars in statutory damage awards on behalf of putative class members who have suffered no actual harm. So perverse are the incentives created under this standing regime that class members have begun to forgo actual damages altogether, seeking instead to simplify the expansion of the class and, consequently, the statutory damage award.

Requiring concrete injury in fact for statutory damages restores needed balance. It ensures that the plaintiffs seeking statutory damages are those who have been actually harmed by a defendant's conduct and have a stake in the litigation beyond the damage award itself. It ensures that the defendants in such lawsuits are businesses whose actions have actually harmed consumers. And it ensures that enforcement is targeted to practices that have caused actual harm—as opposed to those most conducive to class certification.

The Court should reverse the decision of the lower court and reaffirm that the standing analysis requires actual harm to establish injury in fact in statutory damages litigation.

SUMMARY OF ARGUMENT

The consequences of the Court's decision in this case go far beyond whether Robins can continue his suit against Spokeo. The Court has the opportunity to restore balance to a system that has been upset by the unwillingness of the lower courts to enforce the injury-in-fact requirement of standing in statutory damages class actions. This reticence has led to a wave of no-injury, windfall class actions that undermine the goals of statutory-damages laws. By reestablishing the injury-in-fact requirement, this Court can restore balance to our system of litigation.

I. The States have worked with Congress and the judiciary to limit class action abuse and ensure balance in the judicial system.

A. By restoring injury in fact to its rightful place, the Court can avoid a return to the Wild West of class action abuse that states, Congress, and the judiciary have tried to civilize. The experience of the *amici* States demonstrates that class actions are uniquely vulnerable to abuses that subordinate the interests of the class members to the interests of the class's counsel and representative. In the 1990s, class actions were out of control. Certain judges routinely certified nationwide classes without scrutiny and approved inequitable class settlements that provided little compensation for absent class members.

B. Many states recognized these abuses and instituted significant class-action reforms, such as heightened certification procedures and interlocutory appeal of certification orders. The State of Alabama,

the lead *amicus* here, was at the vanguard of both of these trends. Alabama suffered from its share of class-action abuses and the economic damage they cause, but it implemented reforms after those abuses came to light. If the injury-in-fact requirement is weakened and abusive statutory class actions are allowed to proceed, much of this work will be undone.

II. By eliminating the need for actual harm, the lower court's approach to injury in fact upsets the balance and invites a new wave of abusive statutory damages class actions.

A. The class action and statutory damages are both important tools that enable an aggrieved party to vindicate injuries that might otherwise go unredressed. Combined they are particularly powerful, as they allow consumers to pursue significant damages against defendants for widespread abuses that Congress has sought to stamp out. But although these devices can do much good, unmoored from traditional procedural limitations on litigation, they can also cause great destruction. By weakening the injury-in-fact requirement of standing, lower courts have allowed massive class actions seeking firm-killing damages to proceed against defendants that have caused no harm. Doing so not only undermines standing as a gatekeeper against class-action abuse; it undermines the class certification process as well.

B. The rule announced by the lower court collapses the standing analysis and undermines the four part test of Rule 23(a). The three elements of injury in fact, causation, and redressability are "the irreducible constitutional minimum of standing."

Lujan, 504 U.S. at 560. The lower court's rule, however, further reduces the analysis down to one question—did the defendant allegedly fail to conform its behavior to the statute? This approach obviates the need for any substantive inquiry into injury in fact, causation, and redressability.

Similarly, the Rule 23(a) requirements of numerosity, commonality, typicality, and adequate representation are a necessary check on class-action abuse. In no-harm class actions, however, these requirements have no real force. No-harm classes tend to number in the millions, and since they seek compensation for mere technical statutory violations, commonality and typicality present no bar to class certification. In fact, class members may even agree to forgo actual damages so as to make the class as homogeneous as possible. The goal of the class action—making injured parties whole—becomes subordinate to the goal of creating a bigger and more lucrative class.

C. No-harm class actions routinely seek statutory damages in the billions or even trillions of dollars for class members that suffer no concrete injury. Although a windfall for class counsel, these massive suits are often potential firm killers with substantial *in terrorem* effect. Since class certification in these cases is a foregone conclusion, defendants are faced with a "your money or your life" choice. They can either settle or bet the firm on a favorable outcome.

III. The Court can restore needed balance by reaffirming that injury in fact requires actual harm.

The Court can end this confusion and stave off a new wave of class-action abuse by simply

acknowledging that Congress passes statutes against the backdrop of constitutional requirements, including standing. Doing so restores injury in fact to its proper place and ensures that statutory-damages schemes better accomplish their goals. Defendants would face parties they had harmed by their conduct. Plaintiffs would have a stake in the litigation beyond the damage award itself, directing litigation towards practices that cause harm to consumers and against parties who engage in those practices. Restoring balance would thus better accomplish the goals Congress set out to achieve in passing statutory-damages laws while avoiding the danger of overenforcement.

This Court should reverse the lower court.

ARGUMENT

Our system strikes a hard-fought balance between the right of the injured to recover damages and the right of defendants to be free from abusive litigation. By failing to enforce the injury-in-fact requirement, lower courts have upset that balance, allowing windfall class actions to continue against defendants who have harmed no one. By restoring injury in fact to its rightful place in the standing analysis, this Court can reset that balance while vindicating the purpose of statutory-damages laws.

I. The States have a strong interest in ensuring a balanced legal system.

In the *amici* States' experience, class actions are an important procedural device for efficient consumer litigation, but also uniquely vulnerable to

abuse. These vulnerabilities are driven in large part by the huge damage awards waiting at the end of a successful litigation, leading to two problems. First, class counsel has "a powerful financial incentive to [litigate] the case on terms favorable to themselves, but not necessarily favorable to their unknown clients," and certainly not favorable to the public at large. *Dukes v. Wal-Mart, Inc.*, 509 F.3d 1168, 1199 (9th Cir. 2007) (Kleinfield, J., dissenting), *rev'd*, *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011). Secondly, because of the leverage of aggregated claims, a court's preliminary decision to certify a class may coerce a defendant to settle, especially when the only alternative is to "bet[] [the] company on a single jury verdict." *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482, 491 (7th Cir. 2012). Without proper safeguards to prevent the certification of abusive class actions, class counsel have an incentive to bring bigger and bigger classes seeking larger and larger damages, with defendants all but compelled to settle.

A. The *amici* States have borne witness to the magnitude of abuse the class action can invite.

The threat of class-action abuse is not speculative. During the 1990s, the *amici* States were inundated with frivolous class actions that came with significant economic cost. The lead *amicus* here, Alabama, had a front-row seat to many of the worst of these abuses. Alabama judges in certain counties were known to certify nationwide class actions with little or no analysis. From 1995 to 1997, a total of 91 putative class actions were filed in six Alabama

counties. Stateside Assocs., *Class Action Lawsuits in State Courts: A Case Study in Alabama* (1998) (attached to Statement of Dr. John B. Hendricks at Mass Torts and Class Actions: Hearings Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary, 105th Cong. (Mar. 5, 1998)).[2] Judges certified classes in 43 of those cases; in at least 38, the certification was *ex parte* and entered on or shortly after the day the complaint was filed. *Id.* Lawyers coined a colorful term for these quick, *ex parte* certification orders: the "drive-by" class action. *See, e.g., Mitchell v. H & R Block, Inc.*, 783 So. 2d 812, 818 (Ala. 2000) (Hooper, C.J., dissenting).

Compounding this problem, many judges were similarly lax in reviewing proposed class settlements. This lack of diligence led to collusion between named plaintiffs and defendants and unfairness to absent class members. In *Hoffman, et al. v. Bank of Boston*, for example, a homeowner challenged the Bank of Boston's practice of holding too much money in its mortgage escrow accounts, which prevented the homeowners from spending that money until they had paid off their mortgages. *See Kamilewicz v. Bank of Boston Corp.*, 92 F.3d 506 (7th Cir. 1996) (discussing *Hoffman, et al. v. BancBoston Mortg. Corp.*, No. CV-91-1880 (Ala. Cir. Ct., Jan. 24, 1994)). The settlement in that case, approved by an Alabama judge, required the bank to return the overages immediately, but also awarded more than $8.5 million in attorneys' fees to be paid by class

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[2] *Available at* http://commdocs.house.gov/committees/judiciary/hju59921.000/hju59921_0f.htm (last visited July 7, 2015).

members out of pocket. *Kamilewicz*, 92 F.3d at 508-09. The upshot was that many absent class members paid out more in fees than they received in refunds. For one Maine resident, the settlement resulted in a $2.19 credit and $91.33 debit from his bank account. *See Kamilewicz*, 100 F.3d at 1349 (Easterbrook, J., dissenting); *see also, e.g.*, Barry Meier, *Math of a Class-Action Suit: 'Winning' $2.19 Costs $91.33*, N.Y. TIMES, Nov. 21, 1995, at A1.[3] Similarly, a Texas resident received no credit and a $144 debit. *See Benn v. BancBoston*, No. 3:96-CV-0974-J, at 2-4 (N.D. Tex. Oct. 4, 1996); Eddie Curran, *You Win, You Pay*, MOBILE REG. (Ala.), Dec. 29, 1999, at 1A, *available at* 1999 WLNR 7248175; Susan P. Koniak & George M. Cohen, *Under Cloak of Settlement*, 82 VA. L. REV. 1051, 1054-68 (1996).

Alabama was far from alone, particularly in the area of settlement abuse. In Illinois, a class compromised its false-advertising claims against Poland Spring for a settlement of discounted water and charitable contributions. *See* Edward D. Murphy, *Poland Spring Settles Purity Suit*, PORTLAND PRESS HERALD, Nov. 6, 2003, at 6B, *available at* 2003 WLNR 13471684 (discussing *Ramsey v. Nestle Waters N. Am., Inc. d/b/a Poland Spring Water Co.*, No. 03 CHK 817 (Ill. Cir. Ct., Nov. 5, 2003)). The named plaintiff received $12,000, and the plaintiffs' lawyers received $1.35 million. *Id.* A class in Texas compromised its claim that Blockbuster charged excessive late fees for a settlement of coupons giving plaintiffs $1 off a video

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[3] *Available at* http://www.nytimes.com/1995/11/21/us/math-of-a-class-action-suit-winning-2.19-costs-91.33.html (last visited July 7, 2015).

rental; meanwhile, the class attorneys received $9.25 million in fees. *See Blockbuster Settles Late-fee Suit with Certificate Plan*, HOUSTON CHRON., Jan. 13, 2002, *available at* 2002 WLNR 13576864 (discussing *Scott v. Blockbuster Inc.*, No. DI62-535, (Jefferson Cnty., Tex., 2001)). And, in Georgia, a class compromised its claim that Coca-Cola improperly added sweeteners to its drinks for a settlement of 50-cent coupons; the class's counsel received $1.5 million. *Lawyers Get $1.5 Million, Clients Get 50 Cents Off*, FULTON COUNTY DAILY REP., Nov. 21, 1997. *See generally* S. Rep. No. 109-14, at 10-20 (Feb. 28, 2005) (citing examples from Alabama, California, Delaware, Florida, Illinois, Kansas, Minnesota, New York, and Texas).

B. Many states recognized the problem and, together with Congress and the judiciary, implemented reforms.

Happily, through sustained legislative and judicial effort, many states have recognized the inherent problems with class litigation and have implemented important reforms to mitigate them. These state reforms run the gamut from venue rules to certification procedures.

For example, states have adopted rigorous procedures for class certification. In 1997, the Supreme Court of Alabama adopted the rigorous "federal approach" to certification, *Ex parte Am. Bankers Life Assur. Co. of Fla.*, 715 So. 2d 186, 187 (Ala. 1997), and held that "[a] class should not be certified without notice to the defendant." *Ex parte*

Citicorp Acceptance Co., Inc., 715 So. 2d 199, 205 (Ala. 1997). The Alabama Legislature later established detailed procedures to govern class certification. *See* ALA. CODE § 6-5-641. The Texas Legislature likewise enacted comprehensive class-action reform, which set out procedures that parties must follow during class-action litigation. *See* H.B. 4, 78 Leg. Reg. Sess. (Tex. 2003) (codified in part at TEX. CIV. PRAC. & REM. CODE § 26.001 et seq.); *see also Compaq Computer Corp. v. Lapray*, 135 S.W.3d 657, 671 (Tex. 2004) (holding that Texas state courts "must perform a 'rigorous analysis' before ruling on class certification to determine whether all prerequisites to certification have been met"). Similarly, Florida now requires that a trial court may "certify a class action only after it determines through rigorous analysis that the elements of the class action rule have been met." *Seminole Cnty. v. Tivoli Orlando Assocs. Ltd.*, 920 So. 2d 818, 823-24 (Fla. Dist. Ct. App. 2006) (reversing a class certification order). Other states have adopted similar reforms. *See, e.g.*, H.B. 1984 (La. 1997) (codified at LA. CODE CIV. PROC. ANN. arts. 591-97) (setting out procedures that Louisiana courts must follow when certifying a class action); *Beegal v. Park W. Gallery*, 925 A.2d 684, 691 (N.J. 2007) (holding that New Jersey courts "should undertake a 'rigorous analysis' to determine if the requirements of the [class-certification] rule have been met").

Reform has focused on class certification for good reason—because of settlement pressure, the class certification decision is often the *only* contested decision that a court makes in a class-action case. One mechanism to lessen the weight attached to a

certification (and to prolong the period during which the class representative and defendant are truly adverse) is to provide for immediate appellate review of the certification order. Many states have done so. *See* H.B. 1027 (Colo. 2003) (codified at COLO. REV. STAT. § 13-20-901); S.B. 19 (Ga. 2005) (codified at GA. CODE ANN. § 9-11-23(g)); H.B. 2764 (Kan. 2004) (codified at KAN. STAT. ANN. § 60-223(f)); H.B. 1211 (Mo. 2004) (codified at MO. REV. STAT. § 512.020(3)); H.B. 394 (Ohio 1998) (codified at OHIO REV. CODE ANN. § 2505.02(B)(5)); H.B. 2008/S.B. 1522 (Tenn. 2011) (codified at TENN. CODE ANN. § 27-1-125); H.B. 4 (Tex. 2003) (codified at TEX. CIV. PRAC. & REM. CODE § 51.014(a)(3)).

States did not act alone. Congress also got involved, passing the Class Action Fairness Act in 2005. And a number of decisions from this Court also helped to restrain some of the worst class-action abuses. *See, e.g., Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013); *Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345 (2013); *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011); *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336 (2005).

II. Lower court decisions weakening the injury-in-fact requirement have upset the balance of our judicial system.

The result of state and federal reforms is that class-action abuses, although not eliminated, have been lessened in many states, to the benefit of their citizens. The lead *amicus* is a prime example. Thanks to a combination of legislation and judicial decisions, the American Tort Reform Association no

longer lists any locality in Alabama as a "judicial hellhole." *See* AM. TORT REFORM ASS'N, 2014/2015 JUDICIAL HELLHOLES 7-43 (2015). And Alabama has consistently topped lists of states with the most favorable business climates. *See, e.g.*, SITE SELECTION, TOP TEN BUSINESS CLIMATES (2014); SMALL BUSINESS & ENTREPRENEURSHIP COUNCIL, SMALL BUSINESS POLICY INDEX 2014: RANKING THE POLICY MEASURES AND COSTS IMPACTING SMALL BUSINESS AND ENTREPRENEURSHIP 2 (2014) (listing Alabama as 7 of 50).

But the cavalier non-application of the standing doctrine to Rule 23 class actions raises the same concerns about due process and fairness that the States and Congress have worked so hard to redress. In combination, statutory damages and no-harm lawsuits upset the balance in our litigation system and threaten to return us to the "bad old days" of abusive class litigation.

A. Our Constitution and judicial system create a balance between securing the right of the injured to receive restitution and protecting defendants from abusive litigation.

Fundamental fairness requires that a balance be struck between the rights of plaintiffs and defendants. On the one hand, our system generally allows anyone who is harmed to sue to recover for their damages. On the other, certain procedural safeguards—some prudential, others constitutional—exist to protect defendants from unfair litigation. For instance, in cases involving punitive damages, this

Court has pointed to "[e]lementary notions of fairness" in invalidating awards wholly disproportionate to the underlying offense. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574-76 (1996). This Court has spoken of the need to "strike a balance" between copyright holders and those accused of infringing that copyright. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 442 (1984). And this Court has examined efforts by Congress in *qui tam* actions to balance the government's interest in "root[ing] out fraud" against the threat of "stifling parasitic lawsuits." *Graham Cnty. Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, 559 U.S. 280, 294-95 (2010).

The Constitution itself helps to maintain this balance by limiting the jurisdiction of federal courts to "cases" and "controversies." U.S. CONST. art. III, § 2, cl. 1. "[T]he core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan*, 504 U.S. at 560. That core component is itself made up of three elements—injury in fact, causation, and redressability—which are "the irreducible constitutional minimum of standing." *Id.* at 560-61.

These requirements exist for a reason. They ensure that plaintiffs are those who have themselves been injured and have "a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 804 (1985). They prevent bounty hunting litigators from bringing suits where their only concrete interest is the damage award itself. *Vermont Agency of Natural Res. v. U.S. ex rel.*

Stevens, 529 U.S. 765, 773 (2000) ("[A]n interest that is merely a 'byproduct' of the suit itself cannot give rise to a cognizable injury in fact for Article III standing purposes."). And they ensure that a party is not subject to suit unless it has caused harm.

B. The statutory-damages class action and the effective elimination of the injury-in-fact requirement have upset the balance.

The combination of the class action and statutory damages, without a robust injury-in-fact requirement to constrain them, makes abuse inevitable. Statutory damages and the class action are both powerful tools that enable an aggrieved party to vindicate injuries that might otherwise go unredressed. But together, they create "a perfect storm in which two independent provisions combine to create commercial wreckage far greater than either could alone." *Stillmock v. Weis Markets, Inc.*, 385 F. App'x 267, 276 (4th Cir. 2010) (Wilkinson, J., concurring).

Class actions and statutory damages serve essentially the same function. They encourage "litigation by offsetting disincentives to suit where the alleged wrongdoing involves nominal financial harm." Sheila B. Scheuerman, *Due Process Forgotten: The Problem of Statutory Damages and Class Actions*, 74 MO. L. REV. 103, 111 (2009). In other words, they seek to make litigation both more marketable and more attractive to plaintiffs' attorneys.

Class actions, by their nature, endanger the judicial process by creating immense pressure to settle. *See, e.g.*, *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752 (2011) ("But when damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable. Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims."); *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978) ("Certification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense."). And members of this Court have recognized that when the class action and statutory damages meet, that danger is magnified.[4]

Where class members have suffered actual loss, such massive class actions might be the necessary—and even desirable—consequence of legislation designed to make the aggrieved whole. But if actual harm is not required to bring such an action, then the traditional gatekeepers of standing and class certification fail, and parties who have not hurt

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[4] *See Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 445 n.3 (2010) (Ginsburg, J., dissenting) ("When representative plaintiffs seek statutory damages, pressure to settle may be heightened because a class action poses the risk of massive liability unmoored to actual injury."); *Trans Union LLC v. Federal Trade Comm'n*, 536 U.S. 915 (2002) (Kennedy, J., dissenting from denial of cert.) (noted that the petitioner faced a class action of 190 million individuals seeking statutory damages "approaching $190 billion," "crushing liability" that held consequences for "both the national economy and petitioner's thousands of employees.").

anyone face the prospect of devastating—and possibly firm-killing—windfall judgments.

C. Weakening the injury-in-fact requirement collapses the standing analysis and the test for class-action certification.

If a mere statutory violation can be an injury in fact, standing's traditional role as a gatekeeper to litigation falls away, and meaningful class-action certification analysis goes with it. Despite this Court's repeated assertion that injury in fact, causation, and redressability are "the irreducible constitutional minimum of standing," *Lujan*, 504 U.S. at 560, the lower courts have further reduced the test when determining standing in statutory-damages litigation. As the court below admitted in its decision, "[w]here statutory rights are asserted, however, our cases have described the standing inquiry as boiling down to essentially the injury-in-fact prong." *Robins v. Spokeo, Inc.*, 742 F.3d 409, 414 (9th Cir. 2014) (internal citations and quotation marks omitted) *cert. granted*, 135 S. Ct. 1892 (2015). And yet the lower court's rule would actually reduce the standing analysis even further to one question—did the defendant allegedly fail to conform its behavior to the statute? If the answer to that question is yes, the standing inquiry would essentially end.

Weakening the injury-in-fact requirement does more than undermine Article III standing; it also collapses the class-action certification analysis. This Court has described the class action as an

exceptional legal device, one that must meet exceptional standards to move forward. *Wal-Mart*, 131 S. Ct. at 2550-51. Those standards of numerosity, commonality, typicality, and adequate representation, set forth in Rule 23, must be "affirmatively demonstrate[d]" by the party seeking class certification. *Id.* at 2551. These standards are indispensible, the analysis of whether they are met, rigorous. *Id.*

But under the precedent set by the lower court, the Rule 23 standards are all but dispensed with and the analysis of whether or not they are met rendered perfunctory. Classes seeking statutory damages tend to number in the hundreds of thousands, if not the millions. Since these actions allege a bare technical violation of the statute, issues of commonality and typicality are swept away. In fact, named plaintiffs may simply waive claims of actual damages in order to avoid raising any question about commonality or typicality. *See, e.g.*, *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 54 (2007); *Murray v. GMAC Mortg. Corp.*, 434 F.3d 948, 953 (7th Cir. 2006) ("Unless a district court finds that personal injuries are large in relation to statutory damages, a representative plaintiff must be allowed to forego claims for compensatory damages in order to achieve class certification."). This situation stands in direct contrast to traditional class-certification analysis, where the plaintiff cannot prevail by showing "merely that they have all suffered a violation of the same provision of law." *Wal-Mart*, 131 S. Ct. at 2551.

Of course, once the class is certified, the case is essentially over, with settlement following quickly. Thus, the class action is turned on its head. The

more insignificant the actual damages, the more likely a windfall class action will survive the certification process and force a profitable settlement.

Efforts by the district courts to manufacture some sort of restraint on no-harm class actions have failed. Faced with an explosion of new litigation, district judges have been fighting a rear-guard action against windfall class actions, refusing to certify them under the "superiority" analysis. *See generally* Holly S. Hosford, *Avoiding Annihilation: Why Trial Judges Should Refuse to Certify A FACTA Class Action for Statutory Damages Where the Recovery Would Likely Leave the Defendant Facing Imminent Insolvency*, 81 MISS. L.J. 1941 (2012). Under Rule 23(b)(3), a party seeking class certification must show that a class action is "superior to other available methods for the fair[] and efficient[] adjudicat[ion] of the controversy." FED. R. CIV. P. 23(b)(3). Some district courts have held that because damages sought are so out of proportion to the actual harm suffered, the class action is not superior to an individual action and certification is inappropriate.

This approach, however, has an undeniable flaw—it lacks support in Rule 23. The Seventh Circuit overturned, on abuse of discretion grounds, a district court's refusal to certify a class action brought by professional plaintiffs with more than fifty no-harm class actions under their belt. Judge Easterbrook, writing for the Seventh Circuit, rejected what he viewed as an attempt by the district judge to "curtail the aggregate damages for violations he deemed trivial," noting that statutes "must be enforced rather than subverted." *Murray*,

434 F.3d at 953-54. Following the Seventh Circuit's lead, the Ninth Circuit in *Bateman v. American Multi-Cinema, Inc.* found a district court judge abused his discretion in refusing to certify, on superiority grounds, a class seeking $290 million for technical violations of the Fair and Accurate Credit Transactions Act (FACTA). 623 F.3d 708, 712-13 (9th Cir. 2010). Both courts concluded that any excessive award could be reduced after trial, a small comfort to defendants pressured to settle after certification.

III. The Court can restore balance by reiterating that injury in fact requires actual harm.

What district judges cannot accomplish through ad hoc justifications, this Court can do simply by reiterating what it has said again and again—standing requires a concrete injury. No new rules or tests are needed. The Constitution's Article III case or controversy requirement provides the answer. By reaffirming this constitutional principle, the Court can restore balance to the system, ensuring access to the courts for those who have been harmed while protecting the due process rights of defendants against abusive litigation.

At the same time, the Court can help to ensure that statutory damages accomplish their objectives. By requiring actual harm, the Court will encourage action by plaintiffs who have a stake in the litigation beyond the damage award itself. The powerful tools Congress included in statutory-damages legislation will be directed at harmful practices as opposed to mere technical violations.

A. A proper application of the injury-in-fact requirement will eliminate unfair windfall class actions.

An actual injury is foundational to the constitutional standing inquiry. In order to sue, a plaintiff must have been harmed by a defendant in a way that is redressible in court. The principle of "no harm, no tort" is axiomatic in the law; no matter how reckless the driver, no matter how many laws he breaks, without harm there is no cause of action.

But in statutory-damages cases, lower courts have dramatically departed from these principles based on a misinterpretation of this Court's precedent.

1. Lower courts have whittled away the injury-in-fact requirement by relying extensively upon dicta in a line of cases—*Sierra Club v. Morton*, 405 U.S. 727 (1972), *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973), and *Warth v. Seldin*, 422 U.S. 490 (1975). *Warth* has been particularly influential. There, quoting from a footnote in *Linda R.S.*, the Court explained that "[t]he actual or threatened injury required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing.'" 422 U.S. 490, 500 (1975).

This statement cannot be read to eliminate the injury-in-fact requirement. It instead supports the innocuous proposition that Congress can create new legal rights and new causes of action; Congress "has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before." *Lujan*, 504 U.S. at 580

(Kennedy, J., concurring) (citing *Warth*). That the Court did not intend to launch a radical departure from the injury-in-fact requirement is supported by the fact that the Court "has seldom invoked its formulation [of actual or threatened injury]" set forth in the *Warth* line of cases. John S. Haddock, *Articulating A "Rational Connection" Requirement in Article III Standing*, 66 STAN. L. REV. 1423, 1427 (2014).

Lower courts, however, have shown no reticence in applying *Warth* broadly, particularly when statutory damages are involved. *See id.* ("In contrast, circuit courts regularly recite this language to find Article III standing on the basis of a statutory violation."); *Hammer v. Sam's E., Inc.*, 754 F.3d 492, 498 (8th Cir. 2014) *cert. denied*, 135 S. Ct. 1175 (2015) ("Notably, this language is without limitation: the actual-injury requirement may be satisfied *solely* by the invasion of a legal right that Congress *created*."); *Tourgeman v. Collins Fin. Servs., Inc.*, 755 F.3d 1109, 1114 (9th Cir. 2014); *Donoghue v. Bulldog Investors Gen. P'ship*, 696 F.3d 170, 175 (2d Cir. 2012).

But as this Court has explained, *Warth* does not support the proposition that Congress has the constitutional power to confer standing without actual harm. Instead, Congress creates new chains of causation against a constitutional backdrop, subject to the same standing requirement of injury in fact as any other cause of action.

2. The lower courts' reading of *Warth* would give Congress plenary authority over standing. It is black

letter law that every litigation requires a cause of action, an injury in fact, and a remedy. Congress can provide the cause of action and the remedy, but only the litigant can supply the harm, making injury in fact "a hard floor of Article III jurisdiction that cannot be removed by statute." *Summers v. Earth Island Inst.*, 555 U.S. 488, 497 (2009).

The lower court's opinion crashes through that floor. It allows no-injury plaintiffs to use the existence of a cause of action and a remedy to bootstrap themselves straight past the injury-in-fact requirement and into court. But although the violation of a statute can provide a cause of action and a remedy, it cannot, by itself, result in an injury in fact.

Congress has no constitutional authority to pass a statute that says otherwise. The *Lujan* court, in interpreting the *Warth* line of cases, explained, "[Statutory] broadening [of] the categories of injury that may be alleged in support of standing is a different matter from abandoning the requirement that the party seeking review must himself have suffered an injury." 504 U.S. at 578. And the Court in *Warth* recognized this limitation as well—"Of course, Art. III's requirement remains: the plaintiff still must allege a distinct and palpable injury to himself, even if it is an injury shared by a large class of other possible litigants." *Warth*, 422 U.S. at 501.

Although Congress has the power to create a statutory cause of action and remedy, it cannot confer standing on a plaintiff who is not actually harmed. For example, prior to the passage of the Fair Credit Reporting Act (FCRA), an aggrieved

party might have been able to sue a credit reporting agency under any number of common law or statutory causes of action. But in order to have Article III standing to do so, he or she would need to allege an actual injury.

Congress cannot remove that requirement by passing a new statute. It can create a new cause of action to simplify recovery for injured parties. It can create statutory damages in cases where actual damages are small or difficult to ascertain, and it can create a right of action in cases otherwise barred by prudential standing rules. It can even create a new legal right the violation of which may give rise to a lawsuit, such as calling to collect a debt after a certain hour at night. What it cannot do is eliminate the requirement for an injury in fact that is more than the mere violation of the statute itself. It cannot "erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing." *Raines v. Byrd*, 521 U.S. 811, 820 n.3 (1997). Otherwise, standing would be limited only by the will of Congress, not the letter of the Constitution.

B. A robust standing requirement helps accomplish, rather than hinders, the goals of statutory-damages laws.

Requiring a party seeking statutory damages to show actual harm would not only constrain abusive and unfair class actions. It would also better serve the goals of statutory-damages laws than the lower court's unbounded approach to standing.

Statutory damages serve several purposes. They encourage citizens to enforce the law, which is particularly important at a time of strapped state and federal budgets. They ease access to the courts by allowing for recovery, even when damages are small or difficult to quantify. And they help to ensure compliance by the industries they regulate. Windfall class actions undermine these goals.

1. Legislative history demonstrates that Congress enacted statutory-damages laws to correct serious abuses and fill gaps in the law, not to allow windfall class actions for technical violations. For instance, when it enacted the Fair Debt Collections Practices Act, Congress pointed to "the use of abusive, deceptive, and unfair debt collection practices" that "contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy." 15 U.S.C. § 1692(a). It also noted that existing laws were "inadequate to protect consumers." 15 U.S.C. § 1692(b). Congress described the accurate credit reporting requirements in the FCRA as "essential to the continued functioning of the banking system," and necessary to ensure that reporting agencies "exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy." 15 U.S.C. § 1681(a)(1), (a)(4). The lead House sponsor of FACTA described the legislation as critical in the fight against identity theft, which at the time was estimated to cost American consumers $50 billion a year. 149 Cong. Rec. 21734 (2003) (statement of Rep.

Bachus).[5] In urging his colleagues to support FACTA, he suggested it was as "important in finance as the national interstate highway system is to us in transportation." *Id.*

These laws and others like them were enacted to address serious abuses that threatened not only consumers, but the foundations of the economy. Congress created powerful tools to end those abuses and make the injured whole. But a weakened injury-in-fact requirement allows enterprising parties to direct these tools at narrow technical statutory violations that bear little relation to the problems Congress sought to address.

2. The lower courts' rule encourages litigation to redress technical violations, instead of focusing litigation on the most serious violations of statutory rights. The judicial system is already expending significant resources adjudicating these no-harm, windfall class actions. In *Leysoto v. Mama Mia I., Inc.*, the plaintiff sought to bring a windfall class action on behalf of 46,000 members for up to $46,000,000 for technical violations of FACTA that caused no harm to the class members. 255 F.R.D. 693, 694-95 (S.D. Fla. 2009). The defendant was a local restaurant with approximately $40,000 in assets. In another FACTA case, *Lopez v. KB Toys Retail, Inc.*, plaintiff sought up to $2.9 billion in damages because the defendant printed the first four, rather than just the last five, digits of his credit card number. No. CV 07-144-JFW (CWx) (C.D. Cal. July 18, 2007) (Doc. 28). The first four digits of a

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[5] *Available at* http://www.gpo.gov/fdsys/pkg/CREC-2003-09-10/pdf/CREC-2003-09-10.pdf (last visited July 7, 2015).

credit card number provide no information about the customer, but rather identify the issuing bank. *Id.* In *Parker v. Time Warner Entertainment Co., L.P.*, plaintiff sought certification of a class of 12 million to pursue up to $12 billion for violations of the Cable Privacy Act. 331 F.3d 13, 25-26 (2d Cir. 2003) (Newman, J, concurring). The Second Circuit noted that the "prospect of a stunningly large damages award looms as the result of technical violations of the Cable Act that affect potentially millions of subscribers." *Id.* at 21. And in *Taylor v. Acxiom Corporation*, plaintiffs launched a no-harm class action seeking statutory damages under the Drivers' Privacy Protection Act of $2,500 for 20 million class members—for a total award of $5 trillion. No. 2:07-cv-0001 (E.D. Tex. Jan. 4, 2007) (Doc. 1). These are only a few of the many no-harm, windfall class actions that have been filed under statutory-damages laws. *See, e.g.*, Scheuerman, *supra* at 104-07, 111-15.

Decades of experience have demonstrated that class actions tend to follow the path of least resistance. This problem is most obviously demonstrated by the phenomenon of the "piggy-back" or "coat-tail" class action that has plagued efforts to encourage private enforcement of the law. Instead of filling enforcement gaps, "[e]mpirical data show that class action lawyers predominantly file 'copycat' or 'coattail' lawsuits that follow on the heels of government investigations." John H. Beisner, Matthew Shors, Jessica Davidson Miller, *Class Action "Cops": Public Servants or Private Entrepreneurs?*, 57 STAN. L. REV. 1441, 1453 (2005). The reason is pure dollars and cents—class counsel

"prefer 'no research' lawsuits that appear likely (from the investigation itself) to yield lucrative settlements with only a minimal investment of time and money." *Id.* at 1453-54. As a result, this type of class action fails to "broaden the scope of law enforcement, but rather only intensifies the penalty." John C. Coffee, Jr., *Rescuing the Private Attorney General: Why the Model of the Lawyer As Bounty Hunter Is Not Working*, 42 MD. L. REV. 215, 223 (1983).

Much ink has been spilled on ways to better channel so-called "private attorneys general" toward filling the gaps in public enforcement of the law. But weakening the injury-in-fact requirement does not help. Because of the commonality and typicality analysis of Rule 23(a), class counsel have an incentive to seek out narrow, technical violations of the law. These actions are more likely to survive the certification process and result in a profitable settlement. On the other hand, the more serious the violation, the more serious the harm—and the more complicated the fact pattern. If given the choice between a difficult case involving actual harm and a straightforward, no-harm class action, class counsel will choose the latter.

3. Finally, although Congress certainly intended for citizen-enforcement of the law, doing so without a meaningful standing requirement raises the specter of overenforcement. As this Court has recognized, when a government agency is involved, a complex balancing act helps to limit actions to those that are most important. "An agency generally cannot act against each technical violation of the statute it is charged with enforcing." *Heckler v. Chaney*, 470 U.S.

821, 831 (1985). Rather, an agency faced with a decision about whether to pursue an enforcement action "must not only assess whether a violation has occurred," but must also look to "whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all." *Id.*

In private actions, the doctrine of standing, and particularly its injury-in-fact requirement, serves a role as a similar check on overenforcement. Courts are not "publicly funded forums for the ventilation of public grievances or the refinement of jurisprudential understanding." *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 473 (1982). Violations of the law, no matter how serious, do not give litigants "a special license to roam the country" in search of wrongs to right. *Id.* at 487. Even in *qui tam* cases, this Court has found that relators have standing not on the basis of a statutory violation or the bounty they will receive if the suit is successful, but rather as an assignee of the injury in fact suffered by the United States. *Vermont Agency*, 529 U.S. at 772-74.

Overenforcement comes at a cost; it strains judicial resources, chills productive activities, and generates unfair results. As commentators examining this problem have recognized, "Not all substantive principles necessarily warrant enforcement to the nth degree." Richard A. Nagareda, *Aggregation and Its Discontents: Class*

Settlement Pressure, Class-Wide Arbitration, and CAFA, 106 COLUM. L. REV. 1872, 1884 (2006).

The injury-in-fact requirement channels litigation towards productive ends. It ensures that those who have actually suffered harm as a result of another's conduct are directing litigation towards those activities and against those parties that caused the harm. Without the injury-in-fact requirement to constrain them, class representatives will simply seek the most lucrative action for themselves, regardless of the social benefit or the purpose of the statute in question.

* * *

Statutory damages serve an important purpose, but they can be abused, particularly when combined with class actions. If this Court were to adopt the standing rule enunciated by the lower court, the very problems the States worked so hard to solve—eliminating abusive class actions through robust certification procedures and reduced pressure to settle—are likely to return.

A balance must be struck between robust enforcement of laws meant to protect consumers and costly, economically destructive windfall class actions. Fortunately, the Constitution has already struck that balance by requiring actual harm for Article III standing.

CONCLUSION

The Court should reverse the Ninth Circuit.

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REPLY BRIEF

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Supreme Court of the United States

SPOKEO, INC.,

Petitioner,

v.

THOMAS ROBINS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE AMERICAN ASSOCIATION FOR JUSTICE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

IDENTITY AND INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 1

ARGUMENT 6

I. This Is Not a Case in Which a Plaintiff Who Has Suffered No Concrete Injury Sues for Bare Violation of a Federal Statute. 6

A. Plaintiff has alleged violation by defendant of duties imposed by the FCRA, resulting in the dissemination of false information about plaintiff, the harm the FCRA was designed to prevent. 6

B. This case does not squarely present the question whether Congress can create standing by authorizing a person who has suffered no concrete harm to bring a private right of action based solely on a statutory violation. 11

II. Plaintiffs Who Make Out a Statutory Cause of Action for Violation of Their Private Rights Have Article III

Standing Without Pleading Separate Injury In Fact. 13

A. Petitioner conflates statutory causes of action to vindicate public rights with those that vindicate private rights. 13

B. Plaintiffs suing to vindicate their private rights have never been required to prove injury-in-fact in addition to defendant's violation of a duty owed to plaintiff. 19

III. The Cause of Action Created by Congress in the FCRA Is the Type Traditionally Amenable by the Judicial Process. 26

CONCLUSION 32

TABLE OF AUTHORITIES

Cases

ASARCO Inc. v. Kadish, 490 U.S. 605 (1989) 17

Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150 (1970) 22

Atlas Roofing Co. v. Occupational Safety & Health Review Commission, 430 U.S. 442 (1977) 15

Cannon v. Univeristy of Chicago, 441 U.S. 677 (1979) 14

Crowell v. Benson, 285 U.S. 22 (1932) 14, 15

Den ex dem. Murray v. Hoboken Land & Improvement Co., 59 U.S. 272 (1855) 14, 15

F.W. Woolworth Co. v. Contemporary Arts, Inc., 344 U.S. 228 (1952) 31

Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340 (1998) 31

Friends of the Earth, Inc. v. Laidlaw Environmental Services, 528 U.S. 167 (2000) 18

Granfinanciera, S.A. v. Nordberg, 492 U.S. 33 (1989) 15

GTE Sylvania, Inc. v. Consumers Union of United States, Inc., 445 U.S. 375 (1980) 26

Hollingsworth v. Perry, 133 S. Ct. 2652 (2013) 6

Lance v. Coffman, 549 U.S. 437 (2007) 9

Lexmark International, Inc. v. Static Control Components, Inc., 134 S. Ct. 137 (2014) 16

Liebholz v. Harriri, No. CIVA 05-5148 DRD, 2006 WL 2023186 (D.N.J. July 12, 2006) 30

Linda R.S. v. Richard D., 410 U.S. 614 (1973) 11

Lord Byron v. Johnston, 35 Eng. Rep. 851 (1816) 28

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) ..... *passim*

Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) 19, 20

Massachusetts v. Mellon, 262 U.S. 447 (1923) 17

Memphis Community School District v. Stachura, 411 U.S. 299 (1986) 31

Neal v. Electrical Arts, Inc., 374 F. Supp. 2d 574 (W.D. Mich. 2005) 30

Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982) 16

O'Shea v. Littleton, 414 U.S. 488 (1974) 11

Osborn v. Bank of United States, 22 U.S. 738 (1824) 21

Raines v. Byrd, 521 U.S. 811 (1997) 11

Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208 (1974) 17

Sereboff v. Mid Atlantic Medical Services, Inc., 547 U.S. 356 (2006) 14

Spahn v. Julian Messner, Inc., 250 N.Y.S.2d 529 (Sup. Ct. 1964), *aff'd*, 221 N.E.2d 543 (1966), *vacated*, 387 U.S. 239 (1967) 30

Sprint Communications Co., L.P. v. APCC Servs., Inc., 554 U.S. 269 (2008) 26, 29

Steel Co. v. Citizens for a Better Enviroment, 523 U.S. 83 (1998) 10, 26, 30, 31

Stern v. Marshall, 131 S. Ct. 2594 (2011) 16

Summers v. Earth Island Inst., 555 U.S. 488 (2009) 18

Time, Inc. v. Hill, 385 U.S. 374 (1967) 29

Tutun v. United States, 270 U.S. 568 (1926) 22

United States v. Jicarilla Apache Nation, 131 S. Ct. 2313 (2011) 14

United States v. Windsor, 133 S. Ct. 2675 (2013) 24

Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464 (1982) 17

Warth v. Seldin, 422 U.S. 490 (1975) 11, 12

Webb v. Portland Manufacturing Co., 29 F. Cas. 506 (C.C.D. Me. 1838) 21

Statutes

5 U.S.C. § 702 23

15 U.S.C. § 1681b(b)(1) 8

15 U.S.C. § 1681e(b) 7

15 U.S.C. § 1681e(d)(1) 8

15 U.S.C. § 1681e(d)(2) 8

15 U.S.C. § 1681j 9

15 U.S.C. § 1681n(a)(1) 29

15 U.S.C. § 1681n(a)(1)(A) 10, 30, 31

17 U.S.C. § 504(c) 31

29 U.S.C. § 1132(a)(3) 14

33 U.S.C. § 1365(a) 18

Other Authorities

75 Am. Jur. 2d *Trespass* § 186 19

75 Fed. Reg. 9726-01 (Mar. 3, 2010) 9

87 C.J.S. *Trespass* § 124 19

Blackstone, William, Commentaries 20

Davis, Kenneth C., Administrative Law Treatise § 22.02 (1958) 23

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Keenley, James, *How Many Injuries Does It Take? Article III Standing in the Class Action Context*, 95 Cal. L. Rev. 849 (2007) 24

Nelson, Caleb, *Adjudication in the Political Branches*, 107 Colum. L. Rev. 559 (2007) 19

Prosser, William, *Privacy*, 48 Cal. L. Rev. 383 (1960) 28, 30

Restatement (Second) of Torts § 652E (1977) 28

Roberts, Jr., John G., *Article III Limits on Statutory Standing*, 42 Duke L.J. 1219 (1993) 25, 26

Scalia, Antonin, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U. L. Rev. 881 (1983) 11, 23

Sunstein, Cass R., *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 Mich. L. Rev. 163 (1992) ..*passim*

The Supreme Court, 1999 Term—Leading Cases, 114 Harv. L. Rev. 329 (2000) 25

Wigmore, John H., *The Right Against False Attribution of Belief or Utterance*, 4 Ky. L.J. No. 8 (1916) 28

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IDENTITY AND INTEREST OF AMICUS CURIAE

The American Association for Justice is a voluntary national bar association whose members primarily represent the injured victims of misconduct. American Association for Justice members often represent personal injury plaintiffs as well as those whose civil rights and consumer rights have been violated.

The American Association for Justice believes that the court below correctly decided this case. The American Association for Justice is further concerned that this Court granted certiorari based on Petitioner's description of this case as one in which plaintiff alleged a bare violation of the statute with no concrete impact on the plaintiff. Because that is not this case, and because unwarranted expansion of "injury-in-fact" threatens the right of access to the courts of those for whom Congress has created a remedy, the American Association for Justice suggests that the Petition be dismissed as improvidently granted.[1]

SUMMARY OF ARGUMENT

1. This is a tale of two cases. Petitioner describes plaintiff's lawsuit as based on bare violation of the Fair Credit Reporting Act ("FRCA")—by disseminating false information in a consumer report—but no concrete, real-world injury. According

[1] Letters from counsel for all parties evidencing their consent to the timely filing of *amicus curiae* briefs have been filed with the Court. Pursuant to Rule 37.6, *amicus* discloses that no counsel for a party authored any part of this brief, nor did any person or entity other than *amicus*, its members, or counsel make a monetary contribution to its preparation.

to Petitioner, plaintiff's allegations do not include injury-in-fact, which this Court has deemed essential to Article III standing.

In fact, plaintiff alleged that Spokeo violated the FCRA by failing to implement requisite reasonable procedures to ensure accuracy of its consumer reports and to make the requisite disclosures designed to help consumers detect and correct inaccuracies. The dissemination of false information concerning plaintiff is not the alleged violation of the FCRA; it is the consequence of those statutory violations. It is precisely the harm the FCRA was designed to prevent and it is the concrete, real-world injury that Petitioner and supporting amici insist upon.

The Question Presented, whether Congress can confer standing upon a plaintiff who suffers no concrete harm based on bare violation of a federal statute, is not at issue in this case. This is not an instance in which a plaintiff has made out a case based on harm to another or a generalized grievance against violation of a federal statute with no alleged injury to himself. The complaint in this case alleges a concrete harm in the marketing and dissemination of false information regarding plaintiff over the internet to potential employers and others.

Whether Congress could confer standing on a person who suffered no concrete injury may present an important question for this Court. But that is not this case. The Petition was improvidently granted and should be dismissed.

2. Petitioner also erroneously conflates the standing requirements this Court has imposed on

causes of action for the enforcement of public rights with the requirements applicable to cases between private parties for the vindication of private rights. Petitioner relies on this Court's Article III standing decisions holding that plaintiffs must allege injury-in-fact separately and in addition to the violation of a legal interest. However, all of those decisions were rendered in the context of public-rights litigation—cases against the federal government or challenging the manner in which a federal agency administers the law. None of the cases Petitioner relies upon holds that a plaintiff in an action vindicating private rights must allege separate injury-in-fact in addition to the elements of the cause of action.

Historically, the business of the judicial branch has been to adjudicate actions between private parties seeking to vindicate private rights. For much of our history, the issues that are now referred to as "standing" were mediated by the common-law forms of action. Violations of legal rights were associated with remedies that prescribed the damages available. Congress has the authority to create private rights and to provide for a right of action in court to remedy violations of those rights. In that context, the notion of injury-in-fact serves no useful purpose.

Following the New Deal expansion of the reach of federal administrative agencies, Congress has also established private rights of action to enforce "public rights." These statutory rights of action, often referred to as "citizen-suit" provisions, allow private plaintiffs to sue to insure that taxpayer dollars are spent appropriately and federal agencies carry out their functions in accordance with the Constitution and laws of the United States.

Such lawsuits obviously raise separation of powers issues by placing the courts in the position of supervising the federal administrative bureaucracy and by allowing Congress to delegate to private parties the executive function of enforcing the law. The Court developed injury-in-fact as a limiting principle, to require plaintiffs in public-rights cases show concrete, specific injury separate from and in addition to the alleged statutory violation. This Court has given no indication that this requirement should also be applied in private-rights cases. Indeed, such an extension would make little sense: the injury requirement was imposed to make public-rights litigation more closely resemble the private-rights model.

Because Petitioner's arguments and authorities for imposing a separate injury-in-fact requirement are grounded in public-rights cases, this Court should dismiss the Petition in this private-rights case as improvidently granted.

3 This Court has held that a reliable guide to the kinds of cases and controversies within the judicial power under Article III is found in the types of cases at common law that were traditionally viewed as amenable to judicial resolution.

One common law cause of action was defamation, which does not require a plaintiff to plead special damages. Petitioner argues that the false information in this case actually portrayed plaintiff favorably so that damages may not be presumed. To the contrary, false information sent to a prospective employer concerning an applicant leads to the conclusion that the applicant has lied, and so may be presumed to harm the applicant.

In addition, the common law recognizes the tort of invasion of privacy by portrayal of the plaintiff in a false light. That cause of action will lie even if the false information is laudatory, so long as its publication would be offensive to a reasonable person, an issue that goes to the merits, rather than to standing.

The fact that actual damages for the FCRA cause of action are difficult to calculate is also no obstacle to standing. Indeed, Petitioner and several supporting amici concede that where there is harm that is difficult to discover or to quantify—in this case the dissemination of false information regarding plaintiff—Congress may provide for statutory damages.

Whether Congress could authorize recovery of statutory damages in a private-rights case by a plaintiff who has alleged only violation of a statute with no concrete impact on the plaintiff is not a question squarely presented in this case. The Court should therefore dismiss the petition as improvidently granted.

ARGUMENT

I. This Is Not a Case in Which a Plaintiff Who Has Suffered No Concrete Injury Sues for Bare Violation of a Federal Statute.

A. Plaintiff has alleged violation by defendant of duties imposed by the FCRA, resulting in the dissemination of false information about plaintiff, the harm the FCRA was designed to prevent.

This is a tale of two cases: One is described in the Petition and Petitioner's merits brief. The other is set forth in the Complaint actually filed in the district court and addressed by the Ninth Circuit.

It is true that this Court has consistently maintained that Article III standing "requires the litigant to prove that he has suffered a concrete and particularized injury that is fairly traceable to the challenged conduct, and is likely to be redressed by a favorable judicial decision." *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2661 (2013) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). "In other words, for a federal court to have authority under the Constitution to settle a dispute, the party before it must seek a remedy for a personal and tangible harm" that gives him a "direct stake in the outcome of the case." *Id.* at 2661-62. This is, in fact, the case before this Court.

Petitioner's Question Presented asks whether Congress can constitutionally "confer Article III standing upon a plaintiff who suffers no concrete harm . . by authorizing a private right of action based on a bare violation of a federal statute." That question

may be an important one for this Court. But that is not this case.

According to Petitioner, "Respondent alleges that petitioner Spokeo, Inc. violated the Fair Credit Reporting Act (FCRA) by publishing inaccurate information about him and by failing to provide third parties with various notices required by the statute." Pet. Br. 2. Petitioner paints this case as one alleging "bare statutory violations" "without any real-world injury." *Id.* Repeatedly, Spokeo asserts that Robins's FCRA claim, "require[s] proof that information [in the consumer report] was false." *Id.* at 50. *See also Id.* at 51 (referring to "the alleged false statements"); *id* at 52 (disputing that the "allegedly incorrect information inflicted concrete harm").

Specifically, Spokeo describes plaintiff's First Cause of Action as alleging that the company disseminated "search results associated with his name [that] included inaccurate information indicating that he has more education and professional experience than he actually does have; that he is married (although in fact he is not); and that he is better situated financially than he really is." *Id.* at 4-5.

In fact, Robins's Complaint does not allege the publication of false information as the basis for his First Cause of Action, because the publication of false information does not itself violate the FCRA. Rather, plaintiff alleged that Spokeo violated the requirement in 15 U.S.C. § 1681e(b) that consumer reporting agencies "shall follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates." The dissemination of false information

concerning Robins's family and financial status is the harm caused by Spokeo's violation of its duty under the FCRA. In short, that false portrayal of Robins to potential employers and others is the real-world injury that Petitioner and supporting amici insist upon for standing. *See, e.g.*, Br. of Chamber of Commerce, et al. as Amici Curiae 9 (arguing that "the requisite concrete and particularized injury" is not to be found in the bare violation of a statute, but "in the *consequences* of the statutory violation." (emphasis in original).

In addition, Robins alleges that Spokeo violated 15 U.S.C. § 1681e(d)(1), which requires the consumer reporting agency to provide a notice to furnishers of information concerning their obligations under the FRCA to provide accurate information, and § 1681e(d)(2), which requires the agency to furnish its customers with notice of their obligations under the statute. These may be viewed as essential elements of a set of reasonable procedures to assure accuracy. As Robins alleges in his First Cause of Action, Spokeo's failure to comply with these requirements also resulted in the dissemination of false and inaccurate information in his consumer report. Compl. at ¶¶ 58-64.

Spokeo also argues that plaintiff lacked standing to bring suit under his Second and Third Causes of Action. In his Second Cause of Action, Robins alleged that Spokeo violated of 15 U.S.C. § 1681b(b)(1) by furnishing consumer reports for employment purposes without obtaining certifications from the recipients that they will disclose to affected consumers that a credit report will be used for employment purposes and whether any adverse action was taken based on the report. Compl. at ¶¶ 67-

70. His Third Cause of Action alleges that Spokeo violated 15 U.S.C. § 1681j by failing to comply with statutory disclosure requirements for streamlined process for consumers to obtain free annual file disclosures (free credit reports). *Id.* at ¶¶ 73-74.

Petitioner contends that Robins lacks standing under these counts because they allege mere "informational injury" to third parties. Pet. Br. 44. To the contrary, the purpose of these disclosure requirements is not to provide information to the recipients. Their purpose is to assist the consumer in detecting and correcting false information that might be used to deny them employment. For example, the Bureau of Consumer Financial Protection, which now administers this portion of the FCRA, indicates that the purpose of the requirement that consumers be notified of the availability of free annual file disclosures is "to enable consumers to detect and dispute inaccurate or incomplete information in the files of nationwide CRAs" 75 Fed. Reg. 9726-01 (Mar. 3, 2010). Spokeo's failure to make the required disclosures had a direct impact on Robins by making it more difficult to detect and correct the misstatements contained in Spokeo's consumer report on him.

This Court has made clear that a litigant "raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy." *Lujan*, at 573-74. *See also Lance v. Coffman*, 549 U.S. 437, 439 (2007) ("Our refusal to

serve as a forum for generalized grievances has a lengthy pedigree.").

But this is not the case described by Petitioner. Robins is not an "enterprising would-be plaintiff[]" trying to "sue over a mere statutory violation that works no concrete harm." Pet. Br. 31. Nor did Congress in enacting the private right of action under the FCRA, 15 U.S.C. § 1681n(a)(1)(A), purport to confer standing on plaintiffs simply "seeking out and bringing lawsuits over bare statutory violations in the hope of obtaining a statutory bounty asserting little more than a general interest in seeing 'that the Nation's laws are faithfully enforced.'" *Id.* at 30 (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107 (1998)). Nor does the Ninth Circuit's decision commission "private plaintiffs and their counsel [to] roam the country—or the Internet—in search of legal violations in order to reveal their discoveries in federal court in the hopes of obtaining a bounty." Pet. Br. 38 (internal quotes omitted).

Instead, plaintiff alleged that Spokeo's failure to "follow reasonable procedures to assure maximum possible accuracy" of its credit reports resulted in precisely the harm Congress sought to prevent: "Defendant has caused Plaintiff actual and/or imminent harm by creating, displaying, and marketing inaccurate consumer reporting information about Plaintiff." Compl. ¶ 35. The details of the false consumer report concerning plaintiff, set out in the Complaint at ¶¶ 30-35, do not constitute the statutory violations—they are the concrete and particularized harm to Robins that were caused by Spokeo's statutory violations.

B. This case does not squarely present the question whether Congress can create standing by authorizing a person who has suffered no concrete harm to bring a private right of action based solely on a statutory violation.

A crucial contention by Petitioner is that "Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing." Pet. Br. 13 (quoting *Raines v. Byrd*, 521 U.S. 811, 820 n.3 (1997)).

Indisputably, "legal injury is by definition no more than the violation of a legal right; and legal rights can be created by the legislature." Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U. L. Rev. 881, 885 (1983). In addition, this Court has repeatedly held that "[t]he actual or threatened injury required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing.'" *Warth v. Seldin*, 422 U.S. 490, 500 (1975) (quoting *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973)). *See also O'Shea v. Littleton*, 414 U.S. 488, 493 n.2 (1974) ("Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute."); *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring) (Congress "has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before." (citing *Warth*, 422 U. S. at 500)).

Petitioner and supporting amici argue that the Ninth Circuit misconstrued this Court's language in *Warth* as allowing Congress to "override the Constitution's injury-in-fact requirement," Pet. Br. 14, to mean that "a mere breach of statutory duties establishes an injury in fact under Article III and, therefore, that Congress is free to create a private damages remedy for such breach." Amicus Br. of New Eng. Legal Found. 3-4. *See also* Amicus Br. of DRI 8 (*Warth* "simply means that the violation of a statutory right might satisfy Article III standing, but only if the statutory violation has caused a concrete, de facto injury.").

Again, that is not this case. The complaint did not allege a bare violation of Spokeo's duty to employ reasonably accurate procedures and to make FCRA-required disclosures. Robins alleged that, as a consequence of those violations, false information was made available over the internet in a consumer report prepared by Spokeo regarding Robins.

Whether Congress *could* authorize a person who suffered no such adverse impact to bring a private right of action for violation of the FCRA is not presented in this case. To the extent that the Petition asked this Court to address that question, Amicus suggests, the Petition was improvidently granted.

Moreover, in addressing that specific issue in *Lujan*, this Court there strongly suggested that the concrete injury requirement was a separate requirement for standing only in public-rights cases, not in cases such as this one, brought to vindicate private rights. *See Lujan*, 504 U.S. at 578 ("Whether or not the principle set forth in *Warth* can be extended beyond that distinction, it is clear that *in suits against*

the Government, at least, the concrete injury requirement must remain.") (emphasis added).

II. Plaintiffs Who Make Out a Statutory Cause of Action for Violation of Their Private Rights Have Article III Standing Without Pleading Separate Injury In Fact.

A. Petitioner conflates statutory causes of action to vindicate public rights with those that vindicate private rights.

In this tale of two cases, Petitioner's primary argument is that injury-in-fact is a separate and essential element of Article III standing that Congress cannot override. Pet. Br. 13-14. It is true that in public-rights cases, this Court has required plaintiffs to show particularized injury-in-fact in addition to a "generalized grievance" concerning the proper enforcement of the law or spending of tax dollars. *See Lujan*, 504 U.S. at 578. This case, however, is one between private parties to adjudicate private rights. This Court has never required plaintiffs in such cases to establish injury-in-fact in addition to proving the common-law or statutory elements for recovery.

The Question Presented in this case asks whether "Congress may confer Article III standing upon a plaintiff who suffers no concrete harm by authorizing a private right of action based on a bare violation of a federal statute." Amicus American Association for Justice explained in Part I that this is not a case "based on a bare violation of a federal statute." In this Part, the American Association for Justice suggests that the Question Presented conflates this Court's standing jurisprudence in

public-rights cases, which has required a showing of "concrete harm" in addition to statutory violation, with private-rights cases, such as this, where such a requirement serves no purpose. This Court has held that Congress may not authorize plaintiffs to sue to enforce public rights without concrete injury. But that is not this case.

Congress, of course, has the authority to create a statutory right and to create a private right of action to enforce that right. *E.g., Sereboff v. Mid Atlantic Med. Servs., Inc.*, 547 U.S. 356 (2006), construing express private cause of action provided in the Employee Retirement Income Security Act, 29 U.S.C. § 1132(a)(3). *See also Cannon v. Univ. of Chicago*, 441 U.S. 677, 690 n.13 (1979), collecting cases in which this Court recognized a private right of action to enforce a statutory right. Congress has also created private rights of action to enforce "public rights," sometimes referred to as "citizen-suit" provisions. *E.g., Lujan*, 504 U.S. at 571.

The distinction between "public rights" against the Government and "private rights" between private parties is well established. *United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313, 2323 (2011). Private rights arise from the duties owed by one individual to another, the violation of which results in "the liability of one individual to another under the law as defined." *Crowell v. Benson*, 285 U.S. 22, 51 (1932). For example, it is axiomatic that "any matter which, from its nature, is the subject of a suit at common law" is within the judicial power. *Den ex dem. Murray v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 284 (1855).

> At the same time there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper.

Id. Thus private rights litigation includes "private tort, contract, and property cases, as well as a vast range of other cases." *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 51 (1989) (quoting *Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n*, 430 U.S. 442, 458 (1977)).

However, Congress can also authorize public-rights cases that "arise between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments." *Id.* at 51 n.8 (quoting *Crowell v. Benson*, 285 U.S. at 50). *See also* Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 Mich. L. Rev. 163, 165 n.11 (1992) (collecting statutes in which Congress has included "citizen-suit" provisions).

In "public rights" cases, "the Government is involved in its sovereign capacity under an otherwise valid statute creating enforceable public rights." *Granfinanciera*, 492 U.S. at 51. Public rights are "closely intertwined with a federal regulatory program Congress has power to enact" and either

"belongs to [or] exists against the Federal Government." *Id.* at 54-55.[2]

Separation of powers issues arise in such litigation because in creating a private right of action to enforce public rights, Congress allows private parties to bring to court "matters that historically could have been determined exclusively by" the Executive and Legislative Branches. *Northern Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 68 (1982) (plurality). "Private-rights disputes, on the other hand, lie at the core of the historically recognized judicial power," and raise no such difficulties. *Id.* at 70.

In a line of "generalized grievance" cases, this Court has held that one "claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy." *Lujan*, 504 U.S. at 573-74. *See also Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386 (2014) (referring to "the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches"); *ASARCO Inc. v. Kadish*, 490 U.S. 605, 616

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[2] This Court stated that public-rights cases generally involve "the United States as a proper party to the proceeding." *Northern Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 69 n.23 (1982) (plurality). Although this Court's subsequent decisions have rejected that limitation, "it is still the case that what makes a right 'public' rather than private is that the right is integrally related to particular federal government action." *Stern v. Marshall*, 131 S. Ct. 2594, 2613 (2011). This case, of course, does not seek to require, prohibit, or alter any federal government action.

(1989) ("The claims raised here, moreover, are the kind of generalized grievances brought by concerned citizens that we have consistently held are not cognizable in the federal courts"); *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 475 (1982) (similar); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 217 (1974) (similar).

Justice Scalia, writing for the Court in *Lujan*, made clear that the "concrete injury" requirement was a constitutional requisite for standing to vindicate public rights, not the adjudication of private rights, which does not raise separation of powers conflicts.

> Vindicating the *public* interest (including the public interest in Government observance of the Constitution and laws) is the function of Congress and the Chief Executive. . . To permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an "individual right" vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to "take Care that the Laws be faithfully executed," Art. II, § 3. It would enable the courts, with the permission of Congress, "to assume a position of authority over the governmental acts of another and co-equal department."

504 U.S. at 576-77 (quoting *Massachusetts v. Mellon*, 262 U.S. 447, 489 (1923)).

It is clear that the basis for requiring injury-in-fact as "a hard floor of Article III jurisdiction that cannot be removed by statute," Pet Br. 14 (quoting *Summers v. Earth Island Inst.*, 555 U.S. 488, 497 (2009)), lies in the limits of judicial authority over the actions of other branches as well as the limit on Congress's authority to delegate such powers. Plaintiff in this case, by contrast, does not sue the United States nor any agency thereof. He does not seek to require or to bar any governmental action. In short, this action gives rise to none of the separation of powers problems that concerned this Court in *Lujan* and other public-rights cases. Yet, every one of this Court's decisions Petitioner has pressed into service in support of requiring injury-in-fact is a public-rights case. None involves a plaintiff suing to vindicate a private right, whether conferred by statute or common law.[3]

Indeed, historically, this Court has never required a party seeking compensation for violation of a private right to establish, separately and additionally, injury-in-fact.

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[3] The only case relied upon by Petitioner that was not an action against a governmental agency is *Friends of the Earth, Inc. v. Laidlaw Environmental Services*, 528 U.S. 167 (2000), a citizen suit under the Clean Water Act, 33 U.S.C. § 1365(a), alleging that the holder of a permit granted under the CWA to discharge pollutants was not in compliance with the terms of the permit. The case was clearly a public-rights action. Moreover, although the Court found that plaintiffs had alleged an injury-in-fact, the Court did not have occasion to hold that such allegations were essential to standing to bring suit under the CWA. *See* 528 U.S. at 183.

B. Plaintiffs suing to vindicate their private rights have never been required to prove injury-in-fact in addition to defendant's violation of a duty owed to plaintiff.

For most of our history, the province of the judicial power of the United States was "solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803). Until the 20th Century, "[t]he political branches controlled purely public rights." Caleb Nelson, *Adjudication in the Political Branches*, 107 Colum. L. Rev. 559, 571 (2007).

Plaintiffs suing for violation of their property or contract or tort rights pleaded the requisite elements for a writ of trespass or a writ of trespass on the case, and could proceed only by filing the appropriate form of action. "Injury" was subsumed in the cause of action itself. One suing on the case was required to plead damages specially. The writ of trespass, by contrast, presumed that the invasion of the plaintiff's legal interest was itself an injury, and nominal damages could be recovered if no actual damages were proved. *See* F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 Cornell L. Rev. 275, 281-82 (2008).

For example, a plaintiff could make out a cause of action for trespass upon his real property without pleading damages specially. "One whose property rights have been invaded by a trespass, although actual damages are not proven, and even absent any actual loss or injury, can recover a nominal amount for the purpose of vindicating this right." 87 C.J.S. *Trespass* § 124. *See also* 75 Am. Jur. 2d *Trespass* § 186

("Nominal damages are presumed from trespass even where the owner has suffered no actual injury to his or her possessory interest."). The notion of pleading injury-in-fact separately and in addition to the elements of the cause of action was unknown to common-law courts. Indeed, the term "injury-in-fact" did not appear in judicial opinions until the 1970s and "standing" appeared only rarely before that time. *See* Sunstein, *supra*, at 169-70.

In adjudicating private rights, the common law took as "a general and indisputable rule" that "where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded." *Marbury*, 5 U.S. at 163 (quoting 4 William Blackstone, Commentaries, at *23). Each remedy, in turn, was accessed through the proper form of action which "defined the rights of citizens and, concurrently and coextensively, provided a remedy to the injured party." Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 Stan. L. Rev. 1371, 1395 (1988). Petitioner's summary of English common law actions, in which legal wrongs "were in each case defined to require a showing of concrete harm," even if presumed or non-pecuniary, acknowledges as much. *See* Pet. Br. at 22-26. Thus, "injury" was the invasion of a legal interest, which "was mediated through the forms of action." Sunstein, *supra*, at 170 n.30.

As Chief Justice Marshall explained,

> [The "cases or controversies"] clause enables the judicial department to receive jurisdiction to the full extent of the constitution, laws, and treaties of the United States, when any question

> respecting them shall assume such a form that the judicial power is capable of acting on it. That power is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law. It then becomes a case.

Osborn v. Bank of United States, 22 U.S. 738, 819 (1824).

Allegation of injury-in-fact as a separate requirement of a case or controversy was thus not a meaningful concept in private rights cases. The violation of a legal right was itself the injury. As Justice Story explained, "[a]ctual, perceptible damage is not indispensable as the foundation of an action." *Webb v. Portland Manufacturing Co.*, 29 F. Cas. 506, 508 (C.C.D. Me. 1838) (No. 17,322). Rather, it was "among the very elements of common law, that, wherever there is a wrong, there is a remedy to redress it; and that every injury imports damage in the nature of it; and, if no other damage is established, the party injured is entitled to a verdict for nominal damages." *Id.* at 507. "The law tolerates no farther inquiry than whether there has been the violation of a right." *Id.* at 508. A separate showing of injury-in-fact was unnecessary because "[t]he forms of action stood as the gatekeepers of this system." Winter, *supra*, at 1395.

This formalistic view persisted until well into the 20th Century. Justice Brandeis observed,

> Whenever the law provides a remedy enforceable in the courts according to the regular course of legal procedure, and

> that remedy is pursued, there arises a case within the meaning of the Constitution.

Tutun v. United States, 270 U.S. 568 (1926). In short, "what we now consider to be the question of standing was answered by deciding whether Congress or any other source of law had granted the plaintiff a right to sue." Sunstein, *supra*, at 170. In the case at bar, the FCRA expressly granted Robins the right to sue for failure to implement reasonable procedures for accuracy and failure to provide the FCRA disclosures designed to enable consumers to detect and correct false information in their reports.

This Court first employed the term "injury in fact" in *Ass'n of Data Processing Serv. Organizations, Inc. v. Camp*, 397 U.S. 150 (1970), a public-rights case in which plaintiffs sought judicial review of a ruling by the Comptroller of the Currency that permitted national banks to make data processing services available to other banks and to bank customers. In an opinion by Justice Douglas the Court rejected the "legal interest test" for standing as a determination that "goes to the merits." *Id.* at 153. Instead, a court must ask "whether the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise." *Id.* at 152. The Court also made clear that its new "injury-in-fact" language was a basic constitutional requirement under Article III. *Id.*

The injury-in-fact standard can also be traced to a 1958 treatise addressing section 10(a) of the Administrative Procedure Act, which provides that any "person adversely affected or aggrieved by agency action within the meaning of a relevant

statute, is entitled to judicial review thereof. 5 U.S.C. § 702. Professor Kenneth Culp Davis interpreted that provision to mean that "any person adversely affected *in fact*" has standing. 3 Kenneth C. Davis, Administrative Law Treatise § 22.02, at 211-13 (1958). This "interpretation of the Administrative Procedure Act to create liberalized judicial review provisions where none existed before has been of enormous consequence" and has been sharply criticized as a misreading of the APA text and history. Scalia, *supra*, at 887-89. *See also* Sunstein, *supra*, at 186 ("[T]his was a misreading of the APA; the language and history of that statute suggested no such renovation of standing law.").

Regardless of the merits of that critique, it is clear that this Court did not require injury-in-fact as an essential requirement for Article III standing in response to any defect or deficiency in the justiciability of private-rights cases. Instead, this Court came to require plaintiffs in citizen suits and other public rights actions to demonstrate concrete injury in order to cabin judicial supervision of executive agency action and congressional delegation of enforcement of the law to non-accountable private parties. *See Lujan*, at 573-77.

As one observer as noted,

> Nearly all of the seminal injury-in-fact cases occur in the context of lawsuits commenced by private parties to challenge public/government action or inaction. [But] the big question in the Article III inquiry—whether an alleged injury is sufficiently particularized or concrete to invoke the federal judicial

> power—is not particularly meaningful in lawsuits between private parties because such disputes do not present the constitutional separation of powers concerns that arise when the federal judicial power is invoked against other public bodies. We should not be surprised that injury-in-fact jurisprudence has had little, if any, discernible effect on the conduct of bilateral private lawsuits in federal court.

James Keenley, *How Many Injuries Does It Take? Article III Standing in the Class Action Context*, 95 Cal. L. Rev. 849, 850-51 (2007).

> The familiar formula for standing, then, is:
>
> > "First, the plaintiff must have suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) 'actual or imminent, not "conjectural or hypothetical." 'Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be 'fairly trace[able] to the challenged action of the defendant, and Third, it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.' "

United States v. Windsor, 133 S. Ct. 2675, 2685-86 (2013) (quoting *Lujan*, at 560-61).

This Court in *Lujan* gave no indication that the injury-in-fact requirement should be applied beyond public-rights cases in which it was designed to serve as a limiting principle on judicial review of the actions or non-actions of the other branches of government. Indeed, this Court in *Lujan* expressly stated that its concern was only with public-rights cases. *See Lujan*, at 578 ("[I]t is clear that in suits *against the Government, at least*, the concrete injury requirement must remain.") (emphasis added).

Petitioner offers no rationale for extending the injury-in-fact requirement to litigation involving the private rights of individuals. Indeed, this Court's standing jurisprudence, including all the public law decisions relied upon by Petitioner, reflect a consistent effort by this Court to tailor standing in public-rights cases to conform to the "private law model of standing." Sunstein, *supra*, at 187. *See also The Supreme Court, 1999 Term—Leading Cases*, 114 Harv. L. Rev. 329, 336 (2000) ("Much of the Supreme Court's standing jurisprudence in the past two decades reflects the view that Article III limits the federal courts to a private law litigation model.").

This is not a public-rights case. The FCRA does not authorize a private plaintiff to sue a federal agency merely because "he believes the agency is not living up to its mandate." John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 Duke L.J. 1219, 1232 (1993). Nor does the court's decision below threaten to "transform the courts into ombudsmen of the administrative bureaucracy." *Id.* Nevertheless, Petitioner has relied exclusively on public-rights cases to argue for reversal. To the extent that the Petition argued that the injury rule in private rights of action for the vindication of public rights was at issue, the

American Association for Justice suggests that the Petition was improvidently granted.

III. The Cause of Action Created by Congress in the FCRA Is the Type Traditionally Amenable by the Judicial Process.

This is not a case in which a plaintiff lacking concrete injury has sued on the basis of a bare statutory violation of the FCRA, as Petitioner has claimed. *See* Part I, *supra*. Nor is this a case in which an individual has brought a private cause of action to vindicate public rights—the type of case where this Court has required that a plaintiff separately allege an individualized concrete injury. *See* Part II, *supra*. In fact, plaintiff's statutory right of action under the FCRA is precisely the type of private right of action that has been traditionally amenable to judicial resolution.

This Court has noted that the kinds of actions cognizable at common law "offer a meaningful guide to the types of cases that Article III empowers federal courts to consider." *Sprint Communications Co., L.P. v. APCC Servs., Inc.*, 554 U.S. 269, 274-75 (2008). This Court has "always taken [Article III standing] to mean cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process." *Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 102 (1998). *See also GTE Sylvania, Inc. v. Consumers Union of United States, Inc.*, 445 U.S. 375, 382 (1980) ("The purpose of the case-or-controversy requirement is to limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process"); Roberts, *supra*, at 1224 ("courts exercise power only" in matters "traditionally thought

to be capable of resolution through the judicial process.").

The common law has historically and traditionally recognized tort causes of action for the publication of false information. Petitioner attempts to distinguish defamation actions, arguing that the false information disseminated by Spokeo on the internet was not of the type that is "virtually certain to cause serious injury to reputation" and thus presumed to be injurious. Pet. Br. 51.

At the outset, the American Association for Justice submits that, in the context of a consumer report provided for employment purposes, false personal information is necessarily harmful. The prospective employer who compared Robins's job application and resume with the information contained in the Spokeo report may well conclude that Mr. Robins was experiencing marital problems, was overqualified for the position, or was unlikely to be satisfied with the compensation offered. In any event, it is almost certain that the prospective employer would conclude that Mr. Robins had lied. *See* Amicus Br. of United States on the Petition 14 n.2.

The American Association for Justice submits that another close analogue to the statutory cause of action in this case can be found in the common law tort of invasion of privacy by portrayal in a false light. The Restatement describes this tort as follows.

> One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if

> • (a) the false light in which the other was placed would be highly offensive to a reasonable person, and
>
> • (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

Restatement (Second) of Torts § 652E (1977). Comment c to § 652E explains that "highly offensive to a reasonable person" means "when there is such a major misrepresentation of his character, history, activities or beliefs that serious offense may reasonably be expected to be taken by a reasonable man in his position.

The false-light tort as set forth in the Restatement is a subpart of the tort of invasion of privacy. Dean Prosser gave the tort its first modern articulation, tracing its origin to an early 19th Century common-law decision enjoining the advertisement of poems falsely attributed to Lord Byron. *See* William Prosser, *Privacy*, 48 Cal. L. Rev. 383, 398 (1960) (citing *Lord Byron v. Johnston*, 35 Eng. Rep. 851 (1816)). *See also* John H. Wigmore, *The Right Against False Attribution of Belief or Utterance*, 4 Ky. L.J. No. 8, p.3, 5-6 (1916) (indicating that neither economic loss nor "disreputable" false statement was essential to the decision in Lord Byron's case).[4]

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[4] It is not essential that the specific tort have been recognized in 1789 to be "of the sort traditionally amenable to, and resolved by, the judicial process." *See e.g. Sprint*

This Court had occasion to address the tort of false-light invasion of privacy in *Time, Inc. v. Hill*, 385 U.S. 374 (1967), where a family that had been held hostage by escaped convicts were falsely portrayed in a Life Magazine article as having been mistreated and as acting more heroically than they did. The Court ascertained that New York had extended its right to privacy statute, N.Y. Civ. Rights Law §§ 50-51, to encompass portrayal in a false light. *Id.* at 381-82.

Unlike defamation, which is based on damage to one's reputation, "the primary damage" in false-light cases "is the mental distress from having been exposed to public view." *Id.* at 386 n.9. Significantly, the Court noted that the false statements in false-light actions need not be defamatory, "and might even be laudatory and still warrant recovery." *Id.*[5] On that point, the Court looked to a New York court's decision upholding liability under the statute of the publisher of an unauthorized biography of baseball great Warren Spahn. The publication had falsely portrayed the legendary left-hander as having been awarded the Bronze Star and performing acts of great heroism during World War II. *Id.* See the recitation of facts in *Spahn v. Julian Messner, Inc.*, 250 N.Y.S.2d 529, 538-39 (Sup. Ct. 1964), *aff'd*, 221 N.E.2d 543 (1966),

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Communications, 554 U.S. at 79-81, holding that an assignee of a cause of action has Article III standing based in part on developments in state law during the 19th Century.

[5] The Court also held that the First Amendment precluded liability absent proof that defendant knew the representation was false or recklessly disregarded the truth. 385 U.S. at 388. The statutory right of action under 15 U.S.C. § 1681n(a)(1) similarly requires the plaintiff to show that defendant "willfully fail[ed] to comply with any requirement" imposed by the FCRA.

vacated, 387 U.S. 239 (1967). *See also* Prosser, at 400 ("The false light need not necessarily be a defamatory one, although it very often is.").

Whether the false light cast upon plaintiff would be "highly offensive to a reasonable person" under the circumstances "goes to the merits and not to statutory standing." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. at 92. *See, e.g., Liebholz v. Harriri*, No. CIVA 05-5148 DRD, 2006 WL 2023186 (D.N.J. July 12, 2006), where the false statement was not shown to be "highly offensive to a reasonable person," and the district court nonetheless denied the motion to dismiss the false-light claim and did not find lack of standing, stating that the claim was otherwise sufficient and that the party would be permitted to amend the pleading to allege the missing element. *Id.* at *5. *See also Neal v. Elec. Arts, Inc.*, 374 F. Supp. 2d 574, 579 (W.D. Mich. 2005) (where false representation by video game maker was not highly offensive to a reasonable person as a matter of law, the court did not dismiss for lack of jurisdiction, but issued summary judgment on the merits).

The statutory right of action established by Congress in 15 U.S.C. § 1681n(a)(1)(A) is clearly of the type of action that has been traditionally amenable to adjudication. Plaintiff alleged that Spokeo failed to have in place reasonably accurate procedures and failed to make FCRA-required disclosures. As a consequence a consumer report containing false information about plaintiff was marketed and made available to prospective employers and others. The fact that the information was not so damaging to reputation as to be defamatory does not exclude the statutory right of action from the category of disputes

"traditionally amenable to, and resolved by, the judicial process." *Steel Co.*, 523 U.S. at 101.

Nor does the fact that the damages for such harm may be difficult to quantify bar plaintiff. Indeed, Petitioner concedes that Congress can impose statutory damages, as it has in 15 U.S.C. § 1681n(a)(1)(A), where compensatory damages "are difficult to quantify" or "for an *injury* that is likely to have occurred but difficult to establish," Pet. Br. 48 (quoting *Memphis Cmty. Sch. Dist. v. Stachura*, 411 U.S. 299, 310-11 (1986)). Congress could well conclude that the victim of a false consumer report disseminated on the internet faces precisely that difficulty. In fact, Petitioner provides as an example the cause of action for statutory damages for violation of the Copyright Act. *See* 17 U.S.C. § 504(c); *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 349-353 (1998) (reviewing history of statutory damages available for copyright infringements at common law and under state and federal statutes); *F.W. Woolworth Co. v. Contemporary Arts, Inc.*, 344 U.S. 228, 233 (1952) ("Even for uninjurious and unprofitable invasions of copyright the court may, if it deems it just, impose a liability within statutory limits to sanction and vindicate the statutory policy.").

Several amici supporting Petitioner agree that, if defendant's willful statutory violation has had "some real-world impact on the plaintiff," that plaintiff has standing to seek statutory damages under 15 U.S.C. § 1681n(a)(1)(A). Amicus Br. of Trans Union LLC 25-26; Amicus Br. of Chamber of Commerce, et al. 28 (similar).

The dissemination of a false consumer report concerning plaintiff to prospective employers and

others is clearly harm with difficult-to-quantify damages. In that light, there appears to be no real dispute by Petitioner regarding plaintiff's standing to claim statutory damages. Whether Congress can authorize a plaintiff to bring an action against a private party alleging only violation of a statutory duty with no concrete impact on plaintiff may present this Court with an important question of Article III standing. But that is not this case. This Court should dismiss as improvidently granted.

CONCLUSION

For the foregoing reasons, the American Association for Justice urges this Court to dismiss the Petition for Certiorari as improvidently granted, or, alternatively, to affirm the decision of the court of appeals below.

September 8, 2015 Respectfully submitted,

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REPLY BRIEF

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IN THE
Supreme Court of the United States

SPOKEO, INC.,

Petitioner

v.

THOMAS ROBINS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Respondent

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF OF THE AMERICAN BANKERS ASSOCIATION THE CONSUMER BANKERS ASSOCIATION, THE MORTGAGE BANKERS ASSOCIATION, THE CLEARING HOUSE, AND THE FINANCIAL SERVICES ROUNDTABLE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF AMICI CURIAE 1

INTRODUCTION AND SUMMARY OF ARGUMENT 3

ARGUMENT 7

I. "Injury In Law" Claims Are Incompatible With Separation Of Powers Principles And The Protections They Provide. 7

A. The Injury In Fact Requirement Ensures That The Executive – Not Private Class Action Lawyers – Retains Ultimate Responsibility For Enforcing The Law 8

B. The Injury In Fact Requirement Helps Ensure Accountability And Prevent Harmful And Unreasonable Enforcement Actions Against Regulated Parties. 12

II. "Injury In Law" Claims Enable Abusive Class Actions On Matters That Are More Appropriately Dealt With Through Government Enforcement. 16

CONCLUSION 26

TABLE OF AUTHORITIES

Page(s)

CASES

Ariz. Christian Sch. Tuition Org. v. Winn,
131 S. Ct. 1436 (2011) 25

Bateman v. Am. Multi-Cinema, Inc.,
623 F.3d 708 (9th Cir. 2010) 23

Bond v. United States,
131 S. Ct. 2355 (2011) 7

Bowsher v. Synar,
478 U.S. 714 (1986) 7

Cole v. U.S. Capital, Inc.,
389 F.3d 719 (7th Cir. 2004) 23, 24

Dep't of Transp. v. Ass'n of Am. R.Rs.,
135 S. Ct. 1225 (2015) 12

Fid. Fed. Bank & Trust v. Kehoe,
547 U.S. 1051 (2006) 18, 19, 20

First American Financial Corp. v. Edwards,
132 S. Ct. 2536 (2012) 17, 18

Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.,
561 U.S. 477 (2010) 7, 11, 18

Frey v. First Nat'l Bank Sw.,
602 F. App'x 164 (5th Cir. 2015) 21, 22

Gelman v. State Farm Mut. Auto Ins. Co.,
583 F.3d 187 (3d Cir. 2009) 23

Heckler v. Chaney,
470 U.S. 821 (1985) 14

Kehoe v. Fid. Fed. Bank & Trust,
421 F.3d 1209 (11th Cir. 2005) 19

Kehoe v. Fid. Fed. Bank & Trust,
No. 03-80593, 2004 WL 1659617 (S.D. Fla.
June 14, 2004) 19

Kurz v. Chase Manhattan Bank,
273 F. Supp. 2d 474 (S.D.N.Y. 2003) 18

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992) 7, 8, 10

Marbury v. Madison,
5 U.S. (1 Cranch) 137 (1803) 8

Murray v. GMAC Mortg. Corp.,
434 F.3d 948 (7th Cir. 2006) 23

Murray v. New Cingular Wireless Servs., Inc.,
523 F.3d 719 (7th Cir. 2008) 24

New State Ice Co. v. Liebmann,
285 U.S. 262 15

New York v. United States,
505 U.S. 144 (1992) 11

Nike, Inc. v. Kasky,
539 U.S. 654 (2003) 15

Riley v. St. Luke's Episcopal Hosp.,
252 F.3d 749 (5th Cir. 2001) 12

Sierra Club v. Morton,
405 U.S. 727 (1972) 8

Stark v. Wickard,
321 U.S. 288 (1944) 8

In re Tobacco II Cases,
46 Cal. 4th 298 (2009) 16

Traylor v. United Cash Sys., LLC,
No. 3:12-cv-01006, 2014 WL 7404558 (D. Conn. Nov. 10, 2014) 21

Vt. Agency of Nat. Res. v. United States ex rel. Stevens,
529 U.S. 765 (2000) 9, 11, 12

CONSTITUTION AND STATUTES

U.S. Const. art. II, § 3 ..... 3, 7, 14

12 U.S.C. § 5491(c)(3) 17

15 U.S.C. § 1681b(c) 22

15 U.S.C. § 1693b(d)(3) (2011) 21

Credit and Debit Card Receipt Clarification Act of 2007, Pub. L. No. 110-241, 122 Stat. 1565 24

Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) 17

Driver's Privacy Protection Act, 18 U.S.C. § 2721 *et seq*. 19

Electronic Funds Transfer Act, 15 U.S.C. § 1693 *et seq*. 18

Amendment – Electronic Funds Transfer Act, Pub. L. No. 112-216, 126 Stat. 1590 (2012) 22

Fair and Accurate Credit Transactions Act, Pub. L. No. 108-159, 117 Stat. 1952 23

Fair Credit Reporting Act, 15 U.S.C. § 1681, *et seq*. 18

National Bank Act, 12 U.S.C. § 21 *et seq*. 17

Real Estate Settlement Procedures Act, 12 U.S.C. § 2601 *et seq*. 17

Telephone Consumer Protection Act, 47 U.S.C. § 227 *et seq*. 18

Truth in Lending Act, 15 U.S.C. § 1631 *et seq*. 18

Unfair Competition Law, Cal. Bus. & Prof. Code § 17200 *et seq*. 15

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Saikrishna Prakash, *The Chief Prosecutor*, 73 Geo. Wash. L. Rev. 521 (2005) 12

Press Release, CFPB Director Cordray Issues Decision in PHH Administrative Enforcement Action (June 4, 2015), http://tinyurl.com/PHH-CFPB 17

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Cass R. Sunstein, *What's Standing After* Lujan? *Of Citizen Suits, 'Injuries,' and Article III*, 91 Mich. L. Rev. 163 (1992) 10

'ATM Vigilante' Files Suit Against North Coast Credit Union, Anthem, Apr. 17, 2012, http://tinyurl.com/ATM-Vigilante 21

INTEREST OF AMICI CURIAE[1]

The American Bankers Association ("ABA") is the principal national trade association of the financial services industry in the United States. Founded in 1875, the ABA is the voice for the nation's $13 trillion banking industry and its million employees. ABA members are located in each of the fifty States and the District of Columbia, and include financial institutions of all sizes and types, both large and small. ABA frequently submits *amicus curiae* briefs in state and federal courts in matters that significantly affect its members and the business of banking.

Member institutions of the Consumer Bankers Association ("CBA") are the leaders in consumer financial services, including mortgage and home equity lending, nationwide. They include most of the nation's largest bank holding companies, as well as regional and super community banks that collectively hold two-thirds of the industry's total assets. The CBA frequently appears as an *amicus curiae* or a party in litigation where the issues in dispute are of widespread importance or concern to the banking industry.

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici*, their members, or their counsel made any monetary contributions intended to fund the preparation or submission of this brief. Pursuant to this Court's Rule 37.3(a), letters from all parties consenting to the filing of this brief have been submitted to the Clerk.

The Mortgage Bankers Association ("MBA") is the national association representing the real estate finance industry, an industry that employs more than 280,000 people in virtually every community in the country. Headquartered in Washington, D.C., the association works to ensur : the continued strength of the nation's residential and commercial real estate markets, to expand homeownership, and to extend access to affordable housing to all Americans. Its membership of over 2,200 companies includes all elements of real estate finance: mortgage companies, mortgage brokers, commercial banks, thrifts, REITs, Wall Street conduits, life insurance companies and others in the mortgage lending field.

Established in 1853, The Clearing House is the United States' oldest banking association. It is owned by the world's largest commercial banks, which collectively employ 1.4 million people in the United States and hold more than half of all U.S. deposits. The Clearing House is a nonpartisan advocacy organization representing, through regulatory comment letters, *amicus* briefs, and white papers, the interests of its member banks on a variety of systemically important banking issues.

As *advocates for a strong financial future*™, the Financial Services Roundtable ("FSR") represents 100 integrated financial services companies providing banking, insurance, and investment products and services to the American consumer. Member companies participate through the Chief Executive Officer and other senior executives nominated by the CEO. FSR member companies provide fuel for America's economic engine, accounting directly for $98.4 trillion in

managed assets, $1.1 trillion in revenue, and 2.4 million jobs.

Amici, on behalf of their members, have a significant interest in the consequences of a view of standing that enables class action lawyers to recruit plaintiffs who have suffered no injuries, seek staggering statutory damages for what are often technical or trivial violations, and leverage the *in terrorem* effect of the threatened liability to extract lucrative settlements. An important premise of these actions, accepted by the court of appeals below, is that an individual can pursue a statutory damages claim in federal court on the strength of a bare statutory violation, despite having suffered no injury from the alleged violation. This view renders the "injury in fact" requirement for standing a dead letter, and in so doing delegates to the private bar the Executive Branch's responsibility for law enforcement. The abusive class actions that affect *amici* are a direct consequence of a diluted standing requirement that disrupts the Constitution's separation of powers.

INTRODUCTION AND SUMMARY OF ARGUMENT

In this case about the limits of Article III standing, Article II of the Constitution looms large. Under the constitutional design, the Executive – not the courts, not private plaintiffs, and not class action lawyers – has the duty to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3. The separation of powers leaves the courts open to individuals seeking redress for actual injuries they claim to have suffered. But when an uninjured

individual asserts an abstract objection to a violation of the law, it is improperly seeking to exercise the Executive's power over law enforcement.

The advent of no-injury class actions, seeking to impose massive punishments for what are often (at most) technical violations, confirms the wisdom of leaving law enforcement out of private hands. Regulatory agencies have the responsibility, as well as the expertise and incentives, to enforce the law in the public interest. Private class action lawyers have a different interest: profit. The very factors that might lead a responsible and accountable agency to take no enforcement action – the minor nature of the violation, the lack of harm to individuals, the disproportionate nature of the penalties – make for an attractive case from the class action lawyer's perspective. Delegating law enforcement power to uninjured private plaintiffs is thus a recipe for arbitrary, abusive, and unfair litigation. The Court should hold that the federal courts may not entertain such actions.

1. a. The line between an injured plaintiff and an uninjured plaintiff is constitutionally decisive: it distinguishes between an individual seeking redress for personal harm – the traditional office of Article III courts – and an individual seeking to enforce the law. When the purported "injury in fact" is just a bare violation of a law, the plaintiff's goal is simply to enforce that law, a task that is constitutionally committed to the Executive. Allowing private plaintiffs to play this role contravenes the separation of powers. This Court has recognized that principle in cases seeking to compel the Executive to obey the law; it applies with

even greater force where, as here, the Executive acts as a neutral third party with enforcement discretion.

b. The Framers' decision to vest law enforcement authority in the Executive Branch promotes the vital objective of accountability. Rules of law are almost invariably overinclusive, and the Executive plays a critical role in determining whether, and to what extent, potential violations should be prosecuted. As this Court has long recognized, the decision not to enforce is a policy decision generally left to the discretion of agencies. But when private plaintiffs are able to bring "injury in law" class actions, they are able to act as private enforcers of the law without any accountability. The factors that might lead an agency not to take action – the triviality of the violation, the disproportionality of the sanction – are the very factors that may make a case more attractive from the perspective of the class action lawyer. When states such as California have experimented with "private attorney general" suits unmoored from an injury-in-fact requirement, the predictable result has been abusive litigation that is not in the public interest.

2. These concerns have manifested themselves in a rash of abusive class actions. A number of episodes involving the financial services industry are illustrative:

- One bank, faced with the prospect of statutory damages that could have put it out of business, was forced into a settlement after it purchased a list of addresses for a penny apiece from the Florida Department of Motor Vehicles. Florida, alone among the states, had failed to comply with a federal law requiring

consent for such disclosures, and for this technical violation (which the bank may not have had reason to know about), the bank faced a class action suit by a plaintiff who did not even receive any solicitation using his information.

- For a number of years, banks faced class actions for statutory damages based on the lack of a physical placard giving notice of Automated Teller Machine ("ATM") fees – even though an *identical* notice appeared on the machine itself. Many of these lawsuits were brought by the same plaintiffs who roamed cities looking for missing placards, and even by plaintiffs who removed the signs and then sued.

- A round of costly class action litigation was launched when the Seventh Circuit issued a controversial interpretation of the Fair Credit Reporting Act ("FCRA"). The court held that when a defendant purchased credit information in order to make an offer of credit (which the FCRA allows), plaintiffs may make the nebulous allegation that the offer lacks sufficient "value." The result of this interpretation was a series of class actions for staggering damages. The Seventh Circuit specifically instructed district courts that they had no discretion to deny certification based on the triviality of the violation or the disproportionality of the claimed statutory damages.

ARGUMENT

I. "Injury In Law" Claims Are Incompatible With Separation Of Powers Principles And The Protections They Provide.

This Court's standing decisions have refused to "permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to 'take Care that the Laws be faithfully executed." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 577 (1992) (quoting U.S. Const. art. II, § 3). The "irreducible constitutional minimum of standing," *id.* at 560, guards against an undue enlargement of the judicial role, but it also does more than that. Standing limitations serve the complementary function of ensuring – indeed, requiring – that an accountable Executive remains responsible for enforcing the law, with all of the important and sensitive judgments that role entails.

Abandoning a meaningful "injury in fact" requirement carries real costs to this constitutional principle. It is not just a particular president or the institution of the Executive that is injured if Article II authority is delegated away. "The structural principles secured by the separation of powers protect the individual as well," *Bond v. United States*, 131 S. Ct. 2355, 2365 (2011), and are "critical to preserving liberty," *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 480 (2010) (quoting *Bowsher v. Synar*, 478 U.S. 714, 730 (1986)).

By charging an elected and accountable Executive with enforcing the law, the Constitution protects parties subject to government regulation from unreasonable, arbitrary, and abusive

enforcement measures. The availability of "injury in law" claims subverts this protection. Almost invariably brought as class actions, no-injury claims for an agglomeration of statutory damages are in practical effect law enforcement actions. But they are law enforcement actions divorced from the responsibility and accountability of an Executive Branch agency.

A. The Injury In Fact Requirement Ensures That The Executive – Not Private Class Action Lawyers – Retains Ultimate Responsibility For Enforcing The Law.

Article III courts exist "to adjudicate cases and controversies as to claims of infringement of individual rights, whether by unlawful action of private persons or by the exertion of unauthorized administrative power." *Lujan*, 504 U.S. at 577 (quoting *Stark v. Wickard*, 321 U.S. 288, 309-10 (1944)); *see also id.* at 576 ("'The province of the court,' as Chief Justice Marshall said in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803), 'is, solely, to decide on the rights of individuals.'"). Even when the Court has permitted Congress to "broaden[]" the "categories of injury that may be alleged in support of standing," it has never "abandon[ed] the requirement that the [plaintiff] must himself have suffered an injury." *Id.* at 578 (quoting *Sierra Club v. Morton*, 405 U.S. 727, 738 (1972)).

The line between an injured plaintiff and an uninjured plaintiff is constitutionally momentous: it does nothing less than identify what the litigant seeks to accomplish in court. If an individual comes

to court after suffering an injury in fact, her objective is to achieve redress for an individualized harm. If, on the other hand, an individual comes to court *without* having suffered an actual injury, she necessarily has a different goal – enforcing the law. That makes all the difference, because the Judicial Branch is responsible for hearing claims for redress of injury, whereas it is the Executive Branch that enforces the law. As the now-Chief Justice has explained:

> The Article III standing requirement that the judiciary act only at the behest of a plaintiff suffering injury in fact ensures that the court is carrying out *its* function of deciding a case or controversy, rather than fulfilling the *executive*'s responsibility of taking care that the laws be faithfully executed.

John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 Duke L.J. 1219, 1229 (1993).

Understood through this separation of powers lens, there are important constitutional reasons why an "injury in law" cannot substitute for an injury in fact. If a plaintiff's "injury" is *only* that she had a statutory right that was violated, then the only possible objective of her lawsuit – aside from collecting the "bounty" that this Court has said cannot give rise to standing, *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 772 (2000) – is to sanction the defendant for that violation. It is, in other words, to enforce the law, an agenda that falls within the Executive's role, not the

Judiciary's or the bar's. Even if an "injury in law" could qualify as an "injury in fact" without doing violence to the English language, it could not do so without doing violence to the substantive separation of powers concerns underlying the standard.

This Court has noted the relevance of Article II values to standing in an administrative law context, *Lujan*, 504 U.S. 555; the species of "injury in law" claim at issue here presents even more clear-cut separation of powers concerns. Defenders of the "citizen suits" at issue in *Lujan* have urged that there is no separation of powers problem when the Executive is breaking the law and a court simply orders it comply. *See Lujan*, 504 U.S. at 605 (Blackmun, J., dissenting) (arguing that *Lujan* effected an "unseemly solicitude for an expansion of power of the Executive Branch"); Cass R. Sunstein, *What's Standing After* Lujan? *Of Citizen Suits, 'Injuries,' and Article III*, 91 Mich. L. Rev. 163, 212-13 (1992) (arguing that the role of the Take Care clause in the standing analysis should be "nonexistent" because there is no "constitutional difficulty" with an order "that the President is violating the law"). This Court rejected that view, because it is "the function of Congress and the Chief Executive" to enforce the law, including to vindicate "the public interest in Government observance of the Constitution and laws." *Lujan*, 504 U.S. at 576. But even if there were force to the argument that uninjured citizens should be permitted to compel a disobedient Executive to comply, there would still be no ground for usurping the Executive's enforcement role vis-à-vis third parties. Unlike in an administrative law case, the statutory damages

context is one where the Executive is neutral and able to exercise appropriate enforcement discretion. There is no constitutionally sound basis for transferring that law enforcement decision outside of the Executive Branch.

It is no answer that the Executive, by signing the laws that give rise to "injury in law" claims, has acquiesced in the delegation of its law enforcement power to private class action lawyers. "[T]he separation of powers does not depend on the views of individual Presidents, nor on whether 'the encroached-upon branch approves the encroachment.'" *Free Enter. Fund*, 561 U.S. at 497 (internal citation omitted) (quoting *New York v. United States*, 505 U.S. 144, 182 (1992)). That principle applies with special force to constitutional standing. "[S]tanding – like other doctrines of judicial self-restraint – compels the other branches of government to do a better job in carrying out their responsibilities under the Constitution." Roberts, *supra*, at 1229. The political branches may find it convenient to deputize private attorneys to enforce the law, but doing so undermines the important *reasons* the Framers assigned that role to the Executive. *See infra* pp. 12-16.

Neither does the historical tradition of *qui tam* actions justify the modern innovation of a wholly private no-injury class action. This Court has held that False Claims Act ("FCA") relators have standing to assert the federal government's injuries. *Vt. Agency of Nat. Res.*, 529 U.S. 765. The Court deemed the history of *qui tam* actions, stretching back to colonial America and beyond, "well nigh conclusive."

Id. at 777. It also grounded the relator's standing in an assignment of the underlying claim from the government, emphasizing that this assignment is "partial." *Id.* at 773 & n.4. As the lower courts have pointed out in rejecting Article II challenges to *qui tam* actions (an issue this Court has left open), "the Executive retains significant control over litigation pursued under the FCA by a qui tam relator." *Riley v. St. Luke's Episcopal Hosp.*, 252 F.3d 749, 753 (5th Cir. 2001) (en banc). It is one thing for Congress to follow a historical model and invite private attorneys to enforce the law under the watchful gaze (and ultimate veto power) of the Executive; it is quite another to depart from historical precedent and delegate law enforcement powers wholesale to uncontrolled and unaccountable private attorneys.

B. The Injury In Fact Requirement Helps Ensure Accountability And Prevent Harmful And Unreasonable Enforcement Actions Against Regulated Parties.

"Liberty requires accountability." *Dep't of Transp. v. Ass'n of Am. R.Rs.*, 135 S. Ct. 1225, 1234 (2015) (Alito, J., concurring). That "vital constitutional principle," *id.*, is especially critical when it comes to wielding the coercive power of the federal government against those accused of violating the law. Thus, "[o]ne reason the Founders opted for a unitary executive was to ensure that one executive would be accountable for law enforcement choices." Saikrishna Prakash, *The Chief Prosecutor*, 73 Geo. Wash. L. Rev. 521, 583 (2005).

The exercise of enforcement discretion by public officials, subject to the political process and

answerable to the people, is a necessary counterbalance to the ubiquity of government regulation. "[R]ules of law are almost always overinclusive," and "discretionary nonenforcement" is a means by which "the costs of overinclusion can be reduced without a corresponding increase in underinclusion (loopholes)." William M. Landes & Richard A. Posner, *The Private Enforcement of Law*, 4 J. Legal Stud. 1, 38 (1975). Just as "[t]he police overlook minor infractions of the traffic code," *id.*, so too do Executive Branch agencies determine that various technical violations ought not to be enforced to the fullest extent. Indeed, laws that are "[y]esterday's herald" can become "today's bore," and the Executive's "ability to lose or misdirect laws can be said to be one of the prime engines of social change." Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk Univ. L. Rev. 881, 897 (1983).

This Court has recognized the complexities of agency enforcement decisions, and the concomitant need for discretion:

> The agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all. An agency generally cannot act against

> each technical violation of the statute it is charged with enforcing. .
>
> [A]n agency's refusal to institute proceedings shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict – a decision which has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to "take Care that the Laws be faithfully executed." U.S. Const., Art. II, § 3.

Heckler v. Chaney, 470 U.S. 821, 831-32 (1985).

The availability of "injury in law" actions undercuts the constitutional design of law enforcement undertaken by Executive Branch officials, who have both the duty and the incentive to pursue the public interest. "Virtually none of the checks on executive enforcement discretion apply to private parties." Tara Leigh Grove, *Standing as an Article II Nondelegation Doctrine*, 11 U. Pa. J. Const. L. 781, 818 (2009); *see also* Harold J. Krent, *Fragmenting the Unitary Executive: Congressional Delegations of Administrative Authority Outside the Federal Government*, 85 Nw. U. L. Rev. 62, 104 (1990) ("Delegations to private attorneys general are immune from most external supervision. "). While an Executive Branch agency is responsible for making enforcement decisions based on policy considerations, private class action attorneys pursue the most lucrative lawsuits. There is nothing

inherently improper about private actors pursuing private gain – but that is precisely why the constitutional structure requires *public* actors to enforce the law based on the *public* interest.

Indeed, from the perspective of a financially interested "private attorney general," the ability to focus on the most technical and trivial violations is a feature, not a bug. Less serious violations are often easier to prove, and pursuing statutory damages rather than actual damages makes it easier to avoid the sort of individualized inquiries that could impede class certification. Moreover, while the Executive Branch has the obligation to seek proportionality and fairness in enforcement, for a private lawyer the more disproportionate the claimed damages – and thus the greater pressure to settle – the better. Thus, there is a sharp divergence between private incentives and the public interest.

This lesson has been tested and confirmed in the "laboratory" of the States. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (Brandeis, J., dissenting). California experimented with a sweeping Unfair Competition Law (UCL), Cal. Bus. & Prof. Code § 17200 *et seq.*, that "authorize[d] a private individual, acting as a 'private attorney general,' effectively to prosecute a business for unfair competition or false advertising," despite experiencing no personal injury. *Nike, Inc. v. Kasky*, 539 U.S. 654, 665 (2003) (Breyer, J., dissenting from dismissal of the writ of certiorari as improvidently granted). The results were unsurprising: "unscrupulous lawyers exploited the generous standing requirement of the UCL to file 'shakedown'

suits to extort money from small businesses"; they "scour[ed] public records on the Internet for what [were] often ridiculously minor violations of some regulation or law"; and they filed "frivolous lawsuits as a means of generating attorney's fees without creating a corresponding public benefit." *In re Tobacco II Cases*, 46 Cal. 4th 298, 316 (2009) (quoting Proposition 64).[2]

The federal Constitution's insistence that the Executive "take care that the laws be faithfully executed," and the corollary that core law enforcement decisions may not be delegated to private attorneys general, is thus much more than formalism. The constitutional structure locates the power to enforce the law in the Executive Branch for important reasons of accountability and responsibility. Congress cannot delegate that power to private parties without inviting arbitrary and unfair results.

II. "Injury In Law" Claims Enable Abusive Class Actions On Matters That Are More Appropriately Dealt With Through Government Enforcement.

The functional problems with delegating law enforcement powers to private class action lawyers

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[2] Having experienced a private attorney general regime, California voters decided to rein in these "abuses" by requiring "injury in fact." *Tobacco II*, 46 Cal. 4th at 305-06. However, a sharply divided California Supreme Court ruled that this requirement applies only to named plaintiffs but not absent class members who stand to recover. *Id.* at 306.

are not abstract. Rather, the availability of no-injury class actions has led to harmful litigation and extreme settlement pressure across a range of federal statutes, as the breadth of amicus briefs in this case attests. The experience of the financial services industry is particularly illustrative.

Congress, of course, heavily regulates the financial services industry. *See, e.g.*, Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"), Pub. L. No. 111-203, 124 Stat. 1376 (2010); National Bank Act, 12 U.S.C. § 21 *et seq.*; *infra* p. 18 (additional statutes). Moreover, various Executive Branch agencies investigate financial institutions and bring enforcement actions. Regulatory enforcement can often be aggressive, and can concern the same statutes that frequently give rise to no-injury private actions. For example, the Consumer Financial Protection Bureau ("CFPB") recently issued an order requiring a company to pay $109 million for kickbacks in violation of the Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. § 2601 *et seq.* – the exact issue that gave rise to the no-injury class action in *First American Financial Corp. v. Edwards*, 132 S. Ct. 2536 (2012), *writ of certiorari dismissed as improvidently granted*. *See* Press Release, CFPB Director Cordray Issues Decision in PHH Administrative Enforcement Action (June 4, 2015), http://tinyurl.com/PHH-CFPB.[3]

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[3] The President's direct control over the CFPB is limited by the statute's provision that the Director may be removed only "for cause." *See* 12 U.S.C. § 5491(c)(3). Although this Court has previously upheld for-cause removal of agency heads, it has also (continued...)

Notwithstanding the Executive Branch's broad enforcement powers, financial institutions (like many other businesses) are frequent targets of no-injury, statutory damage class actions alleging often-technical violations of federal law. These actions are brought under a range of federal laws, including the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681 *et seq.* (the law at issue here); RESPA (the law at issue in *First American Financial*); the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227 *et seq.*; the Truth in Lending Act ("TILA"), 15 U.S.C. § 1631 *et seq.*; and the Electronic Funds Transfer Act ("EFTA"), 15 U.S.C. § 1693 *et seq.* As one court described a TILA claim, the violations in question can amount to nothing more than "technical nit-picking." *Kurz v. Chase Manhattan Bank*, 273 F. Supp. 2d 474, 479 (S.D.N.Y. 2003). A few examples of this species of litigation illustrate how no-injury class actions diverge from the constitutional vision of an accountable Executive enforcing the law in the public interest.

1. In a case that elicited a statement respecting the denial of certiorari, plaintiffs filed a $1.4 billion class action alleging that a bank violated the Driver's Privacy Protection Act ("DPPA"), 18 U.S.C. § 2721 *et seq.* *See Fid. Fed. Bank & Trust v.*

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recognized the dangers of even greater in-roads on accountability, for example by insulating an agency with two layers of for-cause protection. *See Free Enter. Fund*, 130 S. Ct. at 497-98. Whatever degree of independence the CFPB and certain other agencies have, a wholly private enforcer of the law is many steps further away from Executive control and accountability.

Kehoe, 547 U.S. 1051 (2006) (Scalia, J., joined by Alito, J., concurring in the denial of certiorari). That law limited the disclosure and use of personal information related to motor vehicle records without the consumer's consent. *Id.* But Florida – "alone among the States" – failed to comply with the law, and its Department of Highway Safety and Motor Vehicles ("DMV") did not obtain express consent from its customers to share their information. *Id.* The DMV nonetheless "sold to [the bank], for a penny apiece, the names and addresses of 565,600 individuals in three counties who registered cars with the DMV," which the bank intended to use to mail solicitations. *Id.* For each name, class action lawyers sought $2,500 (or 25,000,000% of the amount the bank paid) in statutory damages. *Id.* Combined with other Florida class actions arising from the same circumstance, "the total amount at stake may reach $40 billion." *Id.*

The case involved no injury – the plaintiff did not even "allege that he ever received any solicitations from [the bank]." *Kehoe v. Fid. Fed. Bank & Trust*, No. 03-80593, 2004 WL 1659617, at *1 (S.D. Fla. June 14, 2004). The Eleventh Circuit, however, held that actual damages were not a prerequisite to recovering statutory damages. *Kehoe v. Fid. Fed. Bank & Trust*, 421 F.3d 1209, 1210 (11th Cir. 2005), *cert. denied*, 547 U.S. 1051 (2006). The bank also maintained that it had no reason to know that the DMV had not obtained consent to disclose the information it purchased, as required by law, and so for that reason as well should not be liable. 547 U.S. 1051 Although Justices Scalia and Alito noted that the *scienter* issue remained open, *id.*, the bank

settled the case rather than risk "annihilating" damages; in opposing class certification after remand, it noted that the damages sought were "more than 3 times [the bank's] net worth." Defs.' Opp. to Class Cert. at 9, No. 9:03-cv-80593, Dkt. No. 133 (S.D. Fla. Mar. 10, 2006); Order Preliminarily Approving Class Action Settlement, No. 9:03-cv-80593, Dkt. No. 194 (S.D. Fla. Aug. 2, 2006).

The Florida DPPA litigation illustrates the significant harms of delegating the Executive's law enforcement power to bounty-hunting private attorneys. From a public interest perspective, it would have made no sense to push an aggressive reading of a statute in order to threaten to put a bank out of business as punishment for at most a technical violation, one which was caused by a state government's failure to follow the law, and resulted in no material harm. But to a private lawyer, the technical nature of the violation, the measure of the regulated party's culpability, and the disproportionality of the sanction make no difference (indeed, they make a case more attractive). What matters instead is the ability to leverage a threat to the defendant's very existence into a lucrative settlement.

2. Banks have been targeted in a series of class actions under the EFTA for failing to post a physical notice of Automated Teller Machine ("ATM") fees. Prior to 2012, "the EFTA required ATM operators to give notice [of transaction fees] in two locations, both 'in a prominent and conspicuous location on or at the [ATM] at which the electronic fund transfer is initiated by the consumer,' and 'on

the screen of the [ATM] . . .'" *Frey v. First Nat'l Bank Sw.*, 602 F. App'x 164, 165 (5th Cir. 2015) (quoting 15 U.S.C. § 1693b(d)(3) (2011)). Even plaintiffs who "admit[ted] that [they] received the on-screen notice of the transaction fee" were permitted to file lawsuits and claim statutory damages based on the absence of a second notice. *Traylor v. United Cash Sys., LLC*, No. 3:12-cv-01006, 2014 WL 7404558, at *1 (D. Conn. Nov. 10, 2014).

As a result, and as Congress ultimately found, class action attorneys exploited the dual-notice requirement by bringing "frivolous" lawsuits against banks, credit unions, and retailers, seeking statutory damages "up to half a million dollars." H.R. Rep. No. 112-576, at 2, *reprinted in* 2012 U.S.C.C.A.N. 731, 732. One credit union, for example, was targeted by a plaintiff who had already "sued 32 financial institutions over fee disclosures on ATMs." *'ATM Vigilante' Files Suit Against North Coast Credit Union*, Anthem, Apr. 17, 2012, http://tinyurl.com/ATM-Vigilante. Congress even heard "evidence that some plaintiffs are purposefully removing these superfluous notices from ATMs and then filing suits against ATM operators for failing to provide adequate notice on the machine." H.R. Rep. No. 112-576, at 2.

This abuse ultimately became so extreme that Congress was compelled to act, prospectively eliminating the physical notice requirement. Amendment – Electronic Funds Transfer Act, Pub. L. No. 112-216, 126 Stat. 1590 (2012); *see Frey*, 602 F. App'x 166-171 (holding that the amendment does not apply retroactively and certifying a class seeking

statutory damages based on the presence of only one notice). But Congress cannot and should not be expected to respond to every innovative form of class action abuse developed by enterprising lawyers. *See* Landes & Posner, *supra*, at 38 (noting that "loopholes" would be inevitable if legislatures attempted to "precisely tailor[]" the law to only conduct that ought to give rise to enforcement actions). This would not pose a problem if uninjured plaintiffs were denied standing, because then a responsible and accountable Executive would be able to determine whether substantively trivial violations ought to be prosecuted. But again, the triviality of a violation like failing to post a superfluous notice is no reason why a private attorney should turn down a quick payday.

3. Financial institutions faced a spate of lawsuits concerning the FCRA's regulation of "prescreened" offers of credit. *See* Richard E. Gottlieb et al., *Fair Credit Reporting Act Update: Firm Offers, Willfulness, Adverse Action, and Receipt Truncation*, 63 Bus. Law. 677 (Feb. 2008). The FCRA permits the purchase of a consumer's credit report for purposes of making a "firm offer of credit," 15 U.S.C. § 1681b(c), but a 2004 decision of the Seventh Circuit announced that courts would investigate whether the offer had "sufficient value." *Cole v. U.S. Capital, Inc.*, 389 F.3d 719, 726 (7th Cir. 2004); *see also Gelman v. State Farm Mut. Auto Ins. Co.*, 583 F.3d 187, 194 (3d Cir. 2009) (suggesting that *Cole* had "effectuat[ed] a judicial amendment of the statute"). The *Cole* decision led to much confusion and disagreement, but it also led to something else:

more than 250 putative class action filings." Gottlieb et al., *supra*, at 677, 680.

In one such case, the district court denied class certification on the ground that the proposed class representative was a "professional plaintiff" who sought no compensatory damages, and statutory damages that, "if awarded to a class, would be ruinously high." *Murray v. GMAC Mortg. Corp.*, 434 F.3d 948, 951 (7th Cir. 2006). Rejecting this basis for denying class certification, Judge Easterbrook wrote that the potential damages of "billions of dollars for purely technical violations of the FCRA" is simply a consequence of the "authorize[d] awards" and the defendant's "decision to obtain the credit scores of more than a million persons." *Id.* at 953. The court refused to allow the district judge "to curtail the aggregate damages for violations he deemed trivial," because "it is not appropriate to use procedural devices to undermine laws of which a judge disapproves." *Id.* at 953-54; *accord Bateman v. Am. Multi-Cinema, Inc.*, 623 F.3d 708, 710-11 (9th Cir. 2010) (holding, in a case brought under the Fair and Accurate Credit Transactions Act ("FACTA"), Pub. L. No. 108-159, 117 Stat. 1952 (amending the FCRA), seeking up to $290 million for including more than 5 digits of a credit card number on receipts, that "the disproportionality between the potential liability and the actual harm suffered, the enormity of the potential damages, or [the defendant's] good faith

compliance" could not "justif[y] the denial of class certification").[4]

Whether or not the courts are genuinely that constrained, the larger point is correct: courts are not the best equipped branch to supply the enforcement discretion called for in these types of cases. That limitation is not a problem when the judiciary is asked to play its traditional role and decide the claims of individuals who have actually been injured. The Executive Branch, by contrast, does have the wherewithal to determine whether a business should be threatened with ruin for a potential technical violation. The availability of no-injury class actions invites and incentivizes private attorneys to circumvent that needed discretion and pursue disproportionate sanctions.

* * *

These are just a few examples, under just a few federal statutes, involving just one industry. The full scope of the problem is much larger, with

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[4] Like the ATM placard litigation, the absurdity of some of the litigation concerning "prescreened" offers of credit and the FACTA's credit card redaction requirements were apparent and led to some degree of change. *See Murray v. New Cingular Wireless Servs., Inc.*, 523 F.3d 719, 721-22 (7th Cir. 2008) (limiting *Cole* to offers of merchandise, as opposed to pure offers of credit); Credit and Debit Card Receipt Clarification Act of 2007, Pub. L. No. 110-241, 122 Stat. 1565 (creating a temporary safe harbor for failures to comply with credit card redaction requirements). Again, the ultimate recognition that these particular situations were untenable – after much costly litigation – does not minimize the harms of allowing no-injury class actions. *See supra* p. 22.

many cases extracting settlements before there can be any published opinion addressing the merits. What these examples illustrate is the practical consequence of "injury in law" standing. The Constitution vests in the Executive the power to enforce the law because that power is too sensitive to be wielded by private parties based on a profit motive. When individuals suffer injury in fact, the courts have traditionally been open to them to seek redress. But when they allege a bare statutory violation, they are enforcing the law (or their view of it) and pursuing a bounty. Particularly in "an era of class actions," *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1449 (2011), the practical consequences of allowing no-injury standing confirm the wisdom of the Framers of limiting the courts to true "cases or controversies," and leaving to the Executive Branch the role of "tak[ing] Care that the Laws be faithfully executed."

CONCLUSION

For the foregoing reasons, as well as the reasons set forth in Petitioner's brief, the decision of the court of appeals should be reversed.

Respectfully submitted,

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REPLY BRIEF

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IN THE

Supreme Court of the United States

SPOKEO, INC.,

Petitioner,

v.

THOMAS ROBINS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR *AMICI CURIAE* CENTER FOR DEMOCRACY & TECHNOLOGY, ELECTRONIC FRONTIER FOUNDATION, NEW AMERICA'S OPEN TECHNOLOGY INSTITUTE AND WORLD PRIVACY FORUM IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether Congress may confer Article III standing upon a plaintiff who suffers no concrete harm, and who therefore could not otherwise invoke the jurisdiction of a federal court, by authorizing a private right of action based on a bare violation of a federal statute.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

INTEREST OF THE *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. CONGRESS PASSED THE FAIR CREDIT REPORTING ACT TO PROTECT CONSUMERS FROM HARMS CAUSED BY THE CONSUMER REPORTING SYSTEM, AND THESE PROTECTIONS CONTINUE TO BE CRITICALLY IMPORTANT IN THE DIGITAL AGE 5

A. In the Fair Credit Reporting Act, Congress Recognized that Inaccurate Information Distributed Through the Credit Reporting System Causes Consumer Harm, and Chose to Provide a Private Right of Action to Aggrieved Individuals as a Remedy 6

B. The Fair Credit Reporting Act Remains Important in the Digital Age to Ensure that Data Brokers Are Held Accountable When They Provide Detailed Consumer Reports Used to Make Decisions About Eligibility for Basic Essentials Such as Employment, Insurance, Credit, and Housing 9

TABLE OF CONTENTS—continued

Page

C. Industry Self-Regulation and Administrative Enforcement Do Not Eliminate the Need for a Private Right of Action in the Fair Credit Reporting Act 14

II. IF THE COURT RULES IN SPOKEO'S FAVOR, IT SHOULD FOCUS NARROWLY ON THE QUESTION OF STANDING IN THIS PARTICULAR CASE 18

CONCLUSION 21

TABLE OF AUTHORITIES

Page(s)

CASES

Friends of the Earth, Inc. v. Laidlaw Envtl. Serv., Inc., 528 U.S. 167 (2000) 17

King v. Burwell, 135 S. Ct. 2480 (2015) 17

Riley v. California, 134 S. Ct. 2473 (2014) 18

United States v. Jones, 132 S. Ct. 945 (2012) 18

United States v. Spokeo, Inc., No. CV12-05001-MMM-SH (C.D. Cal. June 7, 2012) 15

United States v. Spokeo, Inc., No. CV12-05001-MMM-SH (C.D. Cal. June 19, 2012) 16

STATUES AND OTHER AUTHORITIES

15 U.S.C. § 1681(a)(4) 7

15 U.S.C. § 1681(b) 7

15 U.S.C. § 1681a(d) 13-14

15 U.S.C. § 1681a(f) 13

15 U.S.C. § 1681e(b) 7

15 U.S.C. § 1681i 7

15 U.S.C. § 1681m 7

TABLE OF AUTHORITIES—continued

Page(s)

15 U.S.C. § 1681n 8

15 U.S.C. § 1681s 15

115 Cong. Rec. 1381 (1969) 6, 7, 8

S. Rep. No. 91-517 (1969) 6

Sup. Ct. R. 37.6 1

About, Spokeo, http://www.spokeo.com/about (last visited Aug. 29, 2015) 14, 16

Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 (2015) 20

Beth Givens, *Public Records on the Internet: The Privacy Dilemma*, Privacy Rights Clearinghouse (revised March 14, 2015) 9, 10

Cable Communications Policy Act, 47 U.S.C. §§ 521-573 (2015) 19

Consumer Fin. Prot. Bureau, *Consumer Response Annual Report* 20-21 (March 2015) 11

Daniel J. Solove & Woodrow Hartzog, *The FTC and the New Common Law of Privacy*, 114 Colum. L. Rev. 583, 607-08 n.90 (2014) 17

Daniel J. Solove, *The Digital Person: Technology and Privacy in the Digital Age* 16 (2004) 10

Driver's Privacy Protection Act, 18 U.S.C. §§ 2721-2725 (2015) 19

Electronic Communications Privacy Act, 18 U.S.C. §§ 2510-2522 (2015) 19

TABLE OF AUTHORITIES—continued

Page(s)

Fair Credit Reporting: Hearings Before the Subcomm. on Fin. Insts. of the S. Comm. on Banking and Currency, 91st Cong. 10 (1969) 6

Fair Housing Act, 42 U.S.C. §§ 3601-3619 (2015) 20

Fed. Trade Comm'n, *40 Years of Experience with the Fair Credit Reporting Act* (2011) 17

Fed. Trade Comm'n, *Data Brokers: A Call For Transparency and Accountability* 23-35 (May 2014) 10, 11, 14

Fed. Trade Comm'n, *Report to Congress Under Section 319 of the Fair and Accurate Credit Transactions Act of 2003*, Appx. D ii (Dec. 2012) 11-12

Pam Dixon & Robert Gellman, *The Scoring of America: How Secret Consumer Scores Threaten Your Privacy and Your Future*, World Privacy Forum 19 (April 2, 2014) 10

Press Release, Fed. Trade Comm'n, FTC Warns Data Broker Operations of Possible Privacy Violations (May 7, 2013) 14-15

Stored Communications Act, 18 U.S.C. §§ 2701-2709 (2015) 19

Terms of Use, Spokeo (Feb. 24, 2014) 14, 16

Truth in Lending Act, 15 U.S.C. §§ 1601-1651 (2015) 20

Video Privacy Protection Act, 18 U.S.C. §§ 2710-2712 (2015) 19

INTEREST OF THE *AMICI CURIAE*[1]

The Center for Democracy & Technology (CDT) is a non-profit public interest organization focused on privacy, civil liberties, and human rights issues affecting the Internet, other communications networks, and associated technologies. CDT represents the public's interest in an open Internet and promotes the constitutional and democratic values of free expression, privacy, and individual liberty. For more than twenty years, CDT has worked to promote individual rights online within the U.S. and abroad through policy expertise, legislative advocacy, and leadership in analyzing key issues in technology law and policy. CDT has frequently testified on consumer privacy issues in Congress and analyzed new technologies and their effects on consumer rights. CDT filed a complaint against Spokeo with the Federal Trade Commission (FTC) in 2010, prior to the commencement of this case, as discussed in more detail *infra*.

The Electronic Frontier Foundation (EFF) is a San Francisco-based, donor-supported, non-profit civil liberties organization working to protect and

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

promote free speech, privacy, and openness in the digital world. Founded in 1990, EFF now has roughly 23,000 dues-paying members throughout the United States. EFF represents the interests of technology users in both court cases and broader policy debates regarding the application of law in the digital age, and is a recognized leader in privacy and technology law. Through direct advocacy, impact litigation, and technological innovation, EFF's team of attorneys, activists, and technologists actively encourage and challenge industry, government, and courts to support free expression, privacy, and transparency in the information society. As part of its work, EFF strives to ensure that the security and privacy of individuals' electronic information is protected.[2]

New America's Open Technology Institute (OTI) is a program dedicated to technology policy and technology development in support of digital rights, social justice, and universal access to open communications networks. OTI, through its unique blend of policy expertise, technical capacity, and field-level engagement, seeks to promote a stronger and more open Internet to support stronger and more open communities. New America is a non-profit civic enterprise dedicated to the renewal of American politics, prosperity, and purpose in the digital age through big ideas, technological innovation, next generation politics, and creative engagement with broad audiences.

The World Privacy Forum (WPF) is a non-profit public interest research group focusing on privacy is-

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[2] In addition to signing on to this brief, EFF agrees with the arguments set forth in the Brief for Public Law Professors as *Amici Curiae* in Support of Respondent.

sues that have meaningful impact on consumers, with a particular focus on large, complex data flows and a variety of key sectors and technologies, including health, finance, and the workplace. WPF has published a body of significant privacy research, and represents the public interest in this research as well as in a variety of fora at the state, national, and international level. WPF has published reports and testified before Congress and the Federal Trade Commission on the Fair Credit Reporting Act and its relationship to the data broker industry and consumers.

SUMMARY OF ARGUMENT

The issue before the Court is whether Congress may confer Article III standing upon a plaintiff simply by authorizing a private right of action based on a violation of a federal statute—in this case, the Fair Credit Reporting Act (FCRA). The Court must decide whether the judiciary will enforce the laws that Congress chooses to pass, or if the harms that those laws are intended to prevent will not be addressed unless there is additional "real world" injury.

Amici support Mr. Robins' position that a violation of a statute alone with no additional injury is sufficient to establish Article III standing, which will ensure that the FCRA's consumer protections remain robust and enforceable.

For more than 40 years, the FCRA has protected individuals from a range of specific, concrete harms caused by a powerful but opaque consumer reporting system. Congress included a private right of action in this law to ensure that individuals could vindicate their own rights and keep the credit industry and

other FCRA-regulated entities—including furnishers of data—accountable.

The FCRA's carefully balanced consumer protections remain important today. We are now in a digital era in which data brokers routinely acquire, access, compile, analyze, and sell vast data stores of consumers' personal information, transactions, and behaviors. This activity occurs with little regulation or market incentive to ensure that information is accurate, timely, and used in a manner compliant with existing law.

Neither industry self-regulation nor administrative enforcement mechanisms make the FCRA's private right of action unnecessary. Many data brokers do not consider themselves within the scope of the FCRA, even if they furnish information used by others to determine eligibility for employment, insurance, credit, housing, and other FCRA-covered purposes. Furthermore, administrative agencies have limited resources, are focused on pursuing matters to serve the general public interest, and often settle actions through consent decrees. The FCRA's private cause of action is necessary to ensure that individuals can vindicate their own interests and litigate actions to final judgment.

For these reasons, the Court should ensure that consumers may continue to pursue violations of the FCRA through private actions. If, however, the Court rules in Spokeo's favor, it should cabin its holding narrowly to the facts of this case. This result will ensure Congress has the ability to respond to modern privacy threats and avoid the possibility of eviscerating a broad range of other statutory rights.

ARGUMENT

In this case, the Court considers whether the judiciary will enforce the legal rights that Congress chooses to confer on the public, or whether violations of those rights will have no remedy in the absence of additional "real-world" injury.

Mr. Robins argues that a violation of a statute alone with no additional injury is sufficient to establish Article III standing. *See generally* Resp't Br. *Amici* support this position, which will ensure the FCRA remains an effective statutory regime to protect the interests of consumers within the consumer reporting system.

I. CONGRESS PASSED THE FAIR CREDIT REPORTING ACT TO PROTECT CONSUMERS FROM HARMS CAUSED BY THE CONSUMER REPORTING SYSTEM, AND THESE PROTECTIONS CONTINUE TO BE CRITICALLY IMPORTANT IN THE DIGITAL AGE.

The FCRA was enacted to create important consumer protections as the credit reporting industry grew larger and use of its products became more pervasive. The statute's protections remain essential in the digital age, when it is easier to acquire, store, and aggregate information about people than ever before.

A. In the Fair Credit Reporting Act, Congress Recognized that Inaccurate Information Distributed Through the Credit Reporting System Causes Consumer Harm, and Chose to Provide a Private Right of Action to Aggrieved Individuals as a Remedy.

Congress enacted the FCRA in 1970 to respond to the development of a powerful, labyrinthine credit reporting system. While Congress recognized the important role that credit reporting agencies play in modern society, the system was plagued by human and computer-generated inaccuracies, irrelevant and sometimes questionable information, inadequate confidentiality, and insufficient privacy protection for information in credit reports. 115 Cong. Rec 1381, 2410-15 (1969) (statement of Sen. Proxmire). Congress determined that these issues could make it more difficult for people to obtain necessities such as credit, insurance, and employment. S. Rep. No. 91-517, at 1 (1969).[3]

Upon introducing the Fair Credit Reporting Bill, Senator Proxmire cited specific examples of the injurious situations that prompted the need for legislation, including:

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[3] *See also Fair Credit Reporting: Hearings Before the Subcomm. on Fin. Insts. of the S. Comm. on Banking and Currency*, 91st Cong. 10 (1969) (Letter from William McChesney Martin, Jr., Chairman, Board of Governors of the Federal Reserve System) ("The stated purpose of the bill is to require all credit reporting agencies to adopt reasonable procedures in a manner fair and equitable to individual consumers.").

- A consumer who was denied credit because a credit-reporting agency believed he was a different person;

- A woman who lost much of her credit and insurance because she was deemed to have "bad morals";

- A college student who lost his car insurance due to secret testimony from a neighbor;

- A woman who was denied medical insurance because a credit report erroneously characterized her as an alcoholic; and

- A man who had been erroneously convicted of a felony was never able to obtain credit after his exoneration.

115 Cong. Rec 1381, 2411-12 (1969).

To ensure these types of scenarios would not happen in the future, the FCRA was intended to ensure that credit-reporting agencies conducted their activities with fairness, equity, and respect for the confidentiality, accuracy, relevance, and privacy of personal information. 15 U.S.C. § 1681(b), *see also id.* at (a)(4) (2015). The law satisfied these goals by implementing a variety of consumer protections, including requirements to follow reasonable procedures to ensure maximum possible accuracy of information in a credit report, to notify a consumer when a consumer report leads to an adverse event, and a procedure for disputing and correcting inaccurate information. 15 U.S.C. § 1681e(b) (2015), *id.* at 1681m, *id.* at 1681i.

The FCRA included a private right of action for consumers who might be negatively affected by violations of the statute. Today, the scope of the private

right of action under which Mr. Robins filed suit broadly provides that *"[a]ny* person who willfully fails to comply with *any* requirement imposed under this subchapter with respect to *any* consumer is liable to that consumer[.]" 15 U.S.C. § 1681n (2015) (emphasis added).

Notably, the legislative history reveals Congress's concern that computerized systems would exacerbate the problems the FCRA was meant to solve. When introducing the bill, Senator Proxmire noted that an aerospace engineer had called his attention to "the possibilities of error afforded by computer systems, which spew forth incorrect data and half-truths due to the dogmatic nature of computer programming and the limitations of human operations. We desperately need legislation to protect all of us." 115 Cong. Rec 1381, 2411 (1969).

This concern was remarkably prescient: more than 40 years later, the creation, storage, and availability of vast amounts of digital information have compounded the problems the FCRA was meant to address.

B. The Fair Credit Reporting Act Remains Important in the Digital Age to Ensure that Data Brokers Are Held Accountable When They Provide Detailed Consumer Reports Used to Make Decisions About Eligibility for Basic Essentials Such as Employment, Insurance, Credit, and Housing.

The FCRA's protections remain vital today. The Internet, the widespread digitization of information, the ubiquity of computer use, and ever-increasing storage and data analysis capabilities facilitate the use of more information about people than ever before in history.

Local, state, and federal governments have long documented key details about a person's entire life in public records. These paper records were physically stored in basements or back rooms of government offices, ensuring that only motivated actors would spend the time and energy necessary to retrieve a particular piece of information. But today, government agencies often digitize public records and post them on the Internet. Beth Givens, *Public Records on the Internet: The Privacy Dilemma*, Privacy Rights Clearinghouse (revised March 14, 2015).[4]

The digitization of public record information has important social benefits, including more effective government oversight. But one downside of this technological shift is that massive amounts of personal information are now easily available to all, including data about births, marriages, divorces, deaths, bankruptcy, property ownership, tax liens

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[4] https://www.privacyrights.org/ar/onlinepubrecs.htm.

and judgments, civil disputes, arrests, criminal proceedings, voter registration, workers' compensation, professional licenses, and more. Daniel J. Solove, *The Digital Person: Technology and Privacy in the Digital Age* 16 (2004); Givens, *Public Records on the Internet.*

A growing data brokerage industry has access not only to public record information, but countless other data points about consumers that are used for marketing, risk mitigation, background investigation, and more. Fed. Trade Comm'n, *Data Brokers: A Call For Transparency and Accountability* 23-35 (May 2014); Pam Dixon & Robert Gellman, *The Scoring of America: How Secret Consumer Scores Threaten Your Privacy and Your Future,* World Privacy Forum 19 (April 2, 2014).[5] These companies—including Spokeo—gather information from online and offline sources to create detailed profiles about consumers. In addition to public record data from all levels of government, profiles often are supplemented with purchase data from retailers and catalog companies, pre-existing profiles from other data brokers, and information from press reports, blogs, and social media services. Fed. Trade Comm'n, *Data Brokers* at 11-14 (providing a detailed list of information sources for data broker profiles). As author and security expert Bruce Schneier explains, data brokers "buy your personal data from companies you do business with, combine it with other information about you, and sell it to companies that want to know more about you. The more data you produce, the more they

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[5] https://www.ftc.gov/system/files/documents/reports/data-brokers-call-transparency-accountability-report-federal-trade-commission-may-2014/140527databrokerreport.pdf; http://www.worldprivacyforum.org/wp-content/uploads/ 2014/ 04/WPF_Scoring_of_America_April2014_fs.pdf.

collect and the more accurately they profile you." DATA AND GOLIATH 52 (2015). Because the data in these profiles comes from a variety of sources and is held to varying standards of quality, some information may be speculative, inaccurate, out of date, or unverified.

The FCRA is notable because it is the leading federal law that primarily serves as a check on the distribution, maintenance, and use of inaccurate consumer information in particular circumstances. Fed. Trade Comm'n, *Data Brokers* at i. In an otherwise largely unregulated space, the FCRA gives individuals a degree of control over their digital identities by providing a mechanism to ensure that information in consumer reports is accurate, which decreases the likelihood that others—including potential employers, insurers, lenders, and landlords—will make adverse decisions based on erroneous information resulting in lost opportunities, lower wages, lack of housing, high insurance payments, and high credit card interest rates.

This mechanism is an essential check on inaccurate information in the consumer reporting system. Indeed, more than three-quarters of complaints to the Consumer Financial Protection Bureau stem from erroneous information in a credit report. Consumer Fin. Prot. Bureau, *Consumer Response Annual Report* 20-21 (March 2015).[6] Furthermore, a 2012 FTC study found that 26% of participants discovered at least one potentially material error in at least one of their reports from a major credit-reporting agency. Fed. Trade Comm'n, *Report to Congress Under Sec-*

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[6] http://files.consumerfinance.gov/f/201503_cfpb_consumer-response-annual-report-2014.pdf.

tion 319 of the Fair and Accurate Credit Transactions Act of 2003, Appx. D ii (Dec. 2012).[7]

Anecdotal evidence suggests that Spokeo's consumer reports also often contain inaccurate information about consumers.[8] Complaint and Request for Investigation, Injunction, and Other Relief ¶ 26, *In re Spokeo, Inc.* (Fed. Trade Comm'n June 29, 2010) ("CDT Compl."). Erroneous data in Spokeo's listings can result in harm of the very type that Congress sought to address when passing the FCRA. For example:

- Inaccuracies in educational background or work experience could remove an individual from consideration at the earliest phases of a job search.

- Errors in age could cause an insurer to conclude that a person poses more substantial risk than she does, resulting in higher insurance payments or credit interest rates.

- Inaccurate information about gender, ethnicity, or military service may limit a person's opportunities with a potential employer striving to diversify its workforce.

- Inconsistencies in any data could lead an employer, insurer, landlord or lender to conclude that a

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[7] https://www.ftc.gov/sites/default/files/documents/reports/section-319-fair-and-accurate-credit-transactions-act-2003-fifth-interim-federal-trade-commission/130211factareport.pdf.

[8] To respect personal privacy, *amici* will not publish links to Spokeo listings in this brief, but we encourage the Justices of this Court and other readers to survey their own information on the Spokeo website to get a sense of the breadth and veracity of the information in those reports.

person has lied about her background, is untrustworthy, or has poor character.

While Spokeo's inaccuracies might initially appear to favor Mr. Robins, they may have in fact damaged his ability to find employment by creating the erroneous impression that he was overqualified for the work he was seeking, that he might be unwilling to relocate for a job due to family commitments, or that his salary demands would exceed what prospective employers were prepared to offer him. The FCRA's private right of action is the only way Mr. Robins can enforce his rights under the law and redress these inaccuracies. If the FCRA's requirements are effectively unenforceable, data brokers such as Spokeo have little incentive to follow the law.[9]

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[9] Allowing Mr. Robins to proceed in his lawsuit against Spokeo will not jeopardize all information exchange online. The FCRA's consumer protection requirements apply to a subset of companies that meet the narrow definition of a "consumer reporting agency," which is limited to "any person which regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports." 15 U.S.C. § 1681a(f) (2015). A "consumer report" is generally defined (with some exceptions) as "any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for credit or insurance to be used primarily for personal, family, or household purposes; employment purposes, or any other purpose authorized under section 1681b of this title." 15 U.S.C.

C. Industry Self-Regulation and Administrative Enforcement Do Not Eliminate the Need for a Private Right of Action in the Fair Credit Reporting Act.

Individuals need a robust, effective private right of action to enforce the FCRA's requirements because neither industry self-regulation nor administrative enforcement sufficiently protects consumers' interests.

Industry self-regulation is not a powerful enforcer of FCRA requirements. Data brokers—including Spokeo—generally publish disclaimers stating that others cannot use the information they provide to determine eligibility for employment, insurance, credit, or other purposes governed by the FCRA (such as housing). Fed. Trade Comm'n, *Data Brokers* at 34-35 & 40-41; About, Spokeo, http://www.spokeo.com/about (last visited Aug. 29, 2015); Terms of Use, Spokeo (Feb. 24, 2014), http://www.spokeo.com/terms-of-use. According to the FTC, these disclaimers do not discharge a data provider's responsibilities under the FCRA. Fed. Trade Comm'n, *Data Brokers* at 35. Even so, data brokers continue to publish them, presumably because they believe shifting responsibility to the users of the data insulates them from FCRA compliance. Indeed, an undercover operation by the Commission revealed ten data brokers that had disclaimed FCRA liability remained willing to sell consumer data for credit, insurance, housing, or employment screening purposes. Press Release, Fed. Trade Comm'n, FTC

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§ 1681a(d) (2015). Thus, the FCRA covers a fairly limited range of entities—including Spokeo.

Warns Data Broker Operations of Possible Privacy Violations (May 7, 2013).[10] In the absence of effective industry self-governance, the FCRA's private right of action is the key remedy for consumers to hold these companies accountable for their data practices.

Nor does administrative enforcement power make a private right of action unnecessary. *See* 18 U.S.C. § 1681s (providing for the FTC and other agencies to enforce compliance with the FCRA's requirements). In 2010, CDT filed a complaint with the FTC alleging that Spokeo's service violated the FCRA. CDT's investigation revealed that Spokeo actively promoted the use of its database to evaluate prospective business associates and employees on a subscription basis, touting the usefulness of its product to research potential employers and employees. CDT Compl. ¶¶ 13 & 15. At the same time, Spokeo attempted to sidestep legal responsibility under the FCRA by posting a disclaimer stating that Spokeo's service should not be used to determine "eligibility for credit, insurance, employment, or for any other purpose covered by the FCRA." CDT Compl. ¶ 34; *see also* Pet. Br. at 4, citing C.A. Supp. ER 22.

Following CDT's complaint, the Commission filed suit against Spokeo for alleged violations of the FCRA and Federal Trade Commission Act. Complaint for Civil Penalties, Injunction and Other Relief, *United States v. Spokeo, Inc.*, No. CV12-05001-MMM-SH (C.D. Cal. June 7, 2012) ("FTC Compl.").[11] The FTC determined that Spokeo had marketed its

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[10] https://www.ftc.gov/news-events/press-releases/2013/05/ftc-warns-data-broker-operations-possible-privacy-violations.

[11] https://www.ftc.gov/sites/default/files/documents/cases/2012/06/120612spokeocmpt.pdf.

services to companies in the human resources, background screening, and recruiting industries to help determine whether to interview and hire job candidates. FTC Compl. ¶ 10. Spokeo thus met the definition of a consumer reporting agency offering consumer reports to serve as a factor in establishing eligibility for employment under the FCRA. FTC Compl. ¶¶ 12-13. The FTC alleged Spokeo failed to comply with several of the FCRA's requirements, including steps to ensure the accuracy of consumer information. FTC Compl. ¶¶ 18-33.

Unfortunately, no judicial determination was ever made about the legality of Spokeo's practices under the FCRA, as Spokeo quickly settled the Commission's charges. Consent Decree and Order for Civil Penalties, Injunction and Other Relief, *United States v. Spokeo, Inc.*, No. CV12-05001-MMM-SH (C.D. Cal. June 19, 2012).[12] Today, Spokeo continues to publicly represent that it is not a credit-reporting agency and that it does not offer consumer reports, and thus that it is presumably beyond the reach of the FCRA. About, Spokeo, http://www.spokeo.com/about; Terms of Use, Spokeo, http://www.spokeo.com/terms-of-use.

This result demonstrates why administrative enforcement does not make a private right of action unnecessary in the FCRA or any other federal statute. Agencies do not pursue every possible case; they have discretion to exercise enforcement powers strategically in the public interest. Most of the time, these actions result in consent decrees. *See generally*

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[12] https://www.ftc.gov/sites/default/files/documents/cases/2012/06/120612spokeoorder.pdf.

Fed. Trade Comm'n, *40 Years of Experience with the Fair Credit Reporting Act* (2011)[13]; Daniel J. Solove & Woodrow Hartzog, *The FTC and the New Common Law of Privacy*, 114 Colum. L. Rev. 583, 607-08 n.90 (2014).

A private right of action serves a different purpose: it ensures that an aggrieved individual can vindicate her own legal rights, regardless of whether an administrative agency chooses to exercise enforcement power. Congress may create a private right of action for many reasons—for example, to supplement administrative enforcement authority, or to deter future violations of the law—but the courts should presume that Congress has made that decision purposefully and defer to it. *See King v. Burwell*, 135 S. Ct. 2480, 2494 (2015); *Friends of the Earth, Inc. v. Laidlaw Envtl. Serv., Inc.*, 528 U.S. 167, 185 (2000) (stating that Congress's decision to include civil penalties in a statute "warrants judicial attention and respect").

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[13] https://www.ftc.gov/sites/default/files/documents/reports/40-years-experience-fair-credit-reporting-act-ftc-staff-report-summary-interpretations/110720fcrareport.pdf.

II. IF THE COURT RULES IN SPOKEO'S FAVOR, IT SHOULD FOCUS NARROWLY ON THE QUESTION OF STANDING IN THIS PARTICULAR CASE.

Amici believe this Court should find that an alleged violation of the FCRA is sufficient injury in fact to establish Article III standing. If, however, the Court disagrees, it should rule narrowly that Mr. Robins lacks standing to sue under the FCRA. A broad ruling that an alleged statutory violation alone is insufficient injury in fact to establish Article III standing would impinge on congressional authority and invalidate private actions in a wide range of federal statutes.

The question before the Court asks whether Congress can confer Article III standing by authorizing a private right of action based on a "bare violation" of *any* federal statute. As framed, the question presented has implications far beyond Mr. Robins' particular case and the FCRA itself. The Court's ruling could affect the ability of individuals to file claims under private rights of action authorized by a vast number of other federal statutes, as well.

Because of the rapidly changing nature of technology and its effects upon privacy, legislative protection of privacy should and will be an important focus for Congress in the coming years. *See, e.g.*, *Riley v. California*, 134 S. Ct. 2473, 2497 (2014) (Alito, J., concurring); *United States v. Jones*, 132 S. Ct. 945, 962 (2012) (Alito, J., concurring). A ruling in favor of Spokeo would effectively preclude any private right of action in privacy legislation that does not require "real world" harm, which would severely restrict the remedies Congress can provide for privacy violations.

Many federal laws other than the FCRA create private rights of action to remedy privacy violations, which are critical to protect civil liberties in the digital age. These laws include the Electronic Communications Privacy Act, 18 U.S.C. §§ 2510-2522 (2015), the Stored Communications Act, 18 U.S.C. §§ 2701-2709 (2015), the Driver's Privacy Protection Act, 18 U.S.C. §§ 2721-2725 (2015), the Video Privacy Protection Act, 18 U.S.C. §§ 2710-2712 (2015), and the Cable Communications Policy Act, 47 U.S.C. §§ 521-573 (2015). These laws have underpinned the federal privacy framework for decades, and permit individuals to seek civil damages in a range of contexts.

As in the case of the FCRA, each of these laws extends vital protections to individuals in the digital age. These statutes govern electronic communications (including email), cable television services, and video services, among other areas. Each of these technologies produces more data about individuals than when the legal protections were enacted, implicating privacy rights more than ever before. The need to protect individuals in these statutes has only *increased*. Eliminating private rights of action will only undercut the privacy protections Congress enshrined in law.

Privacy violations do not always lead to an economic, physical, or "real world" injury. "Bare violations," when an important enough interest for Congress to protect against, may be the only way that plaintiffs can establish sufficient standing to pursue their rights granted by statute. But an expansive ruling in Spokeo's favor would make it difficult, if not impossible, for plaintiffs to obtain relief for violations of privacy statutes under which injuries are not easi-

ly quantifiable, leaving individual privacy rights unenforceable.

More broadly, a far-reaching decision could destabilize an array of rights that Congress has granted in other realms, including federal statutes dealing with civil rights and consumer protection. *See, e.g.*, Fair Housing Act, 42 U.S.C. §§ 3601-3619 (2015); Truth in Lending Act, 15 U.S.C. §§ 1601-1651 (2015); Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 (2015). There is no need for the Court to open a Pandora's box that could extinguish individuals' ability to pursue claims under all these statutes, which are not before the Court.

An expansive ruling would also make it challenging for courts to know which injuries are concrete enough for judicial redress. Refusing to enforce statutes that do not provide a sufficiently "concrete" injury is a difficult task for trial judges, especially given the wide range of statutes that provide private rights for violations for non-economic harms. The resulting rulings could create uncertainty for judges and litigants throughout the country.

A narrow ruling will avoid these problems and give the Court flexibility to address standing issues created by other laws if they arise in the future. By confining the ruling to Mr. Robins' standing to bring his FCRA claims, the Court will minimize the likelihood of creating instability in the current statutory regime and the courts.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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REPLY BRIEF

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In The
Supreme Court of the United States

SPOKEO, INC.,

Petitioner,

v.

THOMAS ROBINS, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

AMICUS CURIAE BRIEF OF CENTER FOR DIGITAL DEMOCRACY IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

Page

AMICUS CURIAE BRIEF OF CENTER FOR DIGITAL DEMOCRACY 1

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. DATA BROKERS HARM INDIVIDUALS WHEN THEY COLLECT AND SELL INACCURATE DATA 3

A. Brokers collect an unprecedented amount of data, which can be inaccurate 5

1. Brokers fill massive databases with sensitive and personal data about individuals 5

2. Brokers collect and pool data from a variety of sources, including other data brokers, which likely contains inaccurate data 8

3. Individuals generally cannot correct errors in data held by brokers 14

B. Brokers use compiled data to profile individuals algorithmically and sell those profiles for a variety of purposes 16

TABLE OF CONTENTS – Continued

Page

1. Brokers compile data about individuals into detailed profiles and place those individuals into "segments" based on those profiles..... 16

2. Brokers sell profiles, including segments, for numerous purposes..... 18

C. Individuals experience real harm when decisions are made about them based on inaccurate information..... 20

1. Employers use profiles, algorithms, and online sources to make hiring decisions, which can be based on inaccurate information and can harm individuals..... 21

2. Individuals experience harm by being targeted with ads based on race or similarly sensitive characteristics..... 24

CONCLUSION..... 26

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Page

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Page

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AMICUS CURIAE BRIEF OF CENTER FOR DIGITAL DEMOCRACY

INTEREST OF *AMICUS CURIAE*[1]

With the consent of all parties, *amicus curiae* Center for Digital Democracy ("CDD") submits this brief in support of Respondent, Thomas Robins. CDD agrees with the Ninth Circuit and the arguments put forth by Respondent that Robins has Article III standing to sue Spokeo under the Fair Credit Reporting Act ("FCRA") for publishing inaccurate personal information about himself. The purpose of CDD's *amicus curiae* brief is to explain the context in which this case arises: the pervasive collection, sale, and use of vast amounts of personal data that, if inaccurate, causes real harm to individuals.

CDD, a not-for-profit 501(c)(3) organization, is one of the leading consumer protection and privacy organizations in the United States. Since its founding in 2001 (and prior to that through its predecessor organization, the Center for Media Education), CDD has been at the forefront of research, public education, and advocacy protecting consumers in the digital age. CDD advocates before Congress and administrative

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *Amicus Curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief and such consents have been lodged with the Court.

agencies for policies and rules to ensure fair treatment of consumers by the financial, retail, health, advertising, and other industries. For instance, CDD has advised the Federal Trade Commission regarding the prevalence and harms caused by mobile device tracking. CDD also informs consumers, regulators, and the news media about contemporary digital information collection and use practices, such as data brokers' use of algorithms in "programmatic" advertising, via its website, blog, and public reports at http://www.democraticmedia.org.

SUMMARY OF ARGUMENT

This brief provides the Court with additional background information regarding harms experienced by individuals caused by data brokers such as Spokeo. Data brokers collect vast amounts of data about individuals browsing the Internet or using their smartphones, combine these data with data from other sources (which can be inaccurate or unreliable), create profiles of individuals, categorize individuals into groups such as "Hard Times" and "X-tra Needy" for marketing purposes, and sell these data to third parties that use the data to make important and sensitive decisions about employment, credit, and other aspects of people's lives. Because data brokers collect so much information about so many different people from so many sources, inaccuracies are inevitable.

When inaccurate data are used to make decisions about individuals, they experience real harm. For example, if a potential employer decides whom to interview based on inaccurate data, well-qualified individuals may be excluded from consideration. Similarly, given the sophisticated targeting methods employed in digital marketing, offers targeted based on inaccurate data will mean that individuals may be inappropriately associated with ads about arrest records or may be targeted with payday loans when they could otherwise obtain better loan terms.

ARGUMENT

I. DATA BROKERS HARM INDIVIDUALS WHEN THEY COLLECT AND SELL INACCURATE DATA.

Data brokers ("brokers"), including Spokeo, are "companies that collect consumers' personal information and resell or share that information with others." *Data Brokers: A Call for Transparency and Accountability*, Federal Trade Commission at i (May 2014), https://www.ftc.gov/system/files/documents/reports/data-brokers-call-transparency-accountability-report-federal-trade-commission-may-2014/140527databrokerreport.pdf (hereinafter "FTC Report"). Brokers have become persuasive and powerful entities because of technological changes that have made tracking individuals and collecting, analyzing, and storing data inexpensive and easy. Additionally, data processing techniques have evolved such that data collected for one

purpose can now be used for any number of purposes for which it was not originally collected. *See* FTC Report, at vii; Steve Kroft, *The Data Brokers: Selling Your Personal Information*, "60 Minutes," CBS News (Mar. 9, 2014), http://www.cbsnews.com/news/the-data-brokers-selling-your-personal-information. They have grown so large that the top 100 websites "are monitored by more than 1,300 firms," which includes data brokers. Simon Board & Jay Lu, *Competitive Information Disclosure in Search Markets*, at 2 n.1 (Aug. 15, 2015), http://www.econ.ucla.edu/sboard/papers/infosearch.pdf. With such a broad reach online, it is nearly impossible for individuals to avoid being tracked.

While companies other than brokers collect data about individuals both online and offline (such as Google, Facebook, and other advertising companies), this brief focuses on data brokers like Spokeo. This brief will explain what information brokers collect, how they use and sell the information, and how individuals can experience harm as a result of disseminating inaccurate information.[2]

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[2] This brief uses "data" and "information" interchangeably unless otherwise noted.

A. Brokers collect an unprecedented amount of data, which can be inaccurate.

Recently, the Federal Trade Commission and the Senate Commerce Committee studied brokers in part because they have become ubiquitous online yet the public knows very little about them. FTC Report, at 7. Concerns also grew that they were acting in secret and taking advantage of consumers. *A Review of the Data Broker Industry*, Senate Commerce Committee at i (Dec. 18, 2013), http://www.commerce.senate.gov/public/?a=Files.Serve&File_id=0d2b3642-6221-4888-a631-08f2f255b577 (hereinafter "Senate Report").

Three of the primary findings of these reports, which are explained below, were (1) brokers collect an unprecedented amount of information about individuals, (2) brokers collect data from a variety of sources including other data brokers, but the data's accuracy is not guaranteed, and (3) individuals often lack meaningful controls over those data.

1. Brokers fill massive databases with sensitive and personal data about individuals.

Brokers continually collect data about almost every individual and almost everything those individuals do online and offline, creating massive data sets. BlueKai, a broker now owned by Oracle Corporation, "compiles around 1 billion profiles of potential customers around the world, each with an average of

50 attributes." *Getting to Know You*, Economist (Sept. 13, 2014), http://www.economist.com/news/special-report/21615871-everything-people-do-online-avidly-followed-advertisers-and-third-party. The broker Acxiom "has 'multi-sourced insight into approximately 700 million consumers worldwide,' and Datalogix [another broker] asserts its data 'includes almost every U.S. household.'" Senate Report, at 12 (internal citations omitted). Further, the broker and credit scoring company Equifax "maintains approximately 75,000 individual data elements for its use in creating marketing products." *Id.* at 14.

The data collected by brokers are extensive, personal, and sensitive. They include, for example,

- identifying data (name, social security number, driver's license number, birth dates for the individual and all individuals in the household),
- device browser history (types, methods, and costs of purchases, online activities, location, content viewed, items placed in online shopping carts from a personal computer or mobile device),
- court data (criminal convictions, bankruptcies, judgments, liens),
- health data (disability, weight loss & supplements, geriatric supplies),
- loyalty card data (from retail stores and mobile applications), and

- financial data (household income, credit worthiness, ability to afford products, actual purchase data).

See FTC Report, App'x B; Senate Report, App'x II & III, http://www.commerce.senate.gov/public/?a=Files.Serve&File_id=0cecef67-8e18-4bcb-b867-2a8e13d552f7; *see also IXI Digital Targeting Options*, IXI Digital, https://www.ixicorp.com/ixi-digital/ixi-digital-targeting-options (providing products for targeting consumers based on, among other things, wealth, mortgage propensity, and ability to pay). These data come from both online and offline sources, which can be merged, creating comprehensive personal profiles. FTC Report, at 47.

"Raw" data elements, such as name, address, telephone number, and purchase history, are called "actual" elements. A broker may then infer certain characteristics based on those "actual" data elements, which are called "derived" elements. Brokers use derived elements to predict personal interests or may attempt to categorize individuals based on sensitive personal characteristics. Harlan Yu, *Data Brokers Target the "Urban Scramble,"* EqualFuture (May 28, 2014), https://www.equalfuture.us/2014/05/28/data-brokers-target-the-urban-scramble.

Brokers obtain seemingly endless data points because they collect data from a variety of sources as companies attempt to stay current with individuals' interests and modes of communication. *Merkle Data Management Cloud*, Merkle, http://www.merkleinc.

com/what-we-do/marketing-technology/merkle-data-management-cloud (Merkle "meets the evolving needs of brands by enabling the most relevant customer experiences that lead to deeper customer relationships.").

2. Brokers Collect and Pool Data from a Variety of Sources, Including Other Data Brokers, Which Likely Contains Inaccurate Data.

Brokers collect and pool data from as many sources as possible. Most commonly, brokers share and sell with each other the information they compile such as data from telephone companies about consumers receiving new landline accounts, data from automobile dealers about sales, service, warranty, and aftermarket repairs, and data from offline sources such as marketing surveys, warranty registrations, and contests. FTC Report, at 13-14; Senate Report, at 16. Brokers also purchase retail-transaction-specific data from retailers, which includes the type, date, and dollar amount of each purchase and the type of payment used. FTC Report, at 13; Senate Report, at 16. "Registration" websites, such as news and travel sites, sell data they receive through account registrations. FTC Report, at 13. Additionally, some brokers obtain data directly from financial institutions. Senate Report, at 16.

Brokers collect data from governmental sources as well. The Federal government houses data from, for instance, the Census and the Death Master File,

which includes the Social Security Numbers of deceased individuals. Federal courts provide information on bankruptcies. State and local governments provide data including property records, taxes, professional or recreational licenses, voter registrations, and court records. FTC Report, at 11-12.

A significant amount of data comes from online tracking of individuals and mining publicly available online sources. Tracking and data analysis technologies pervade the Internet and mobile devices. These technologies are, in most cases, surreptitiously installed on the individual's device, such as cookies, Flash cookies, and web beacons. *Tracking the Trackers: What Are Cookies?*, Guardian (Apr. 23, 2012), http://www.theguardian.com/technology/2012/apr/23/cookies-and-web-tracking-intro. Once installed, they collect data about purchases made, websites visited, content viewed, time spent on those websites, location, browser history, browsing habits, and other data unbeknownst to consumers (so-called "passive" collection). *See Policy on Passive Electronic Data Collection*, Oregon Dept. of Transportation (Mar. 12, 2015), http://www.oregon.gov/ODOT/TD/TP/Plans/ADM%2008%2001.pdf ("Passive [data collection occurs when] the customer has little or no awareness of the data being collected and requires no explicit actions on the customer's part."). A report by the *Wall Street Journal* in 2010 found that the top 50 websites installed an average of 64 trackers on their visitors' browsers. Julia Angwin, *The Web's New Gold Mine: Your Secrets*, Wall St. J. (July 30, 2010), http://www.wsj.com/

articles/SB10001424052748703940904575395073512989404.

Where tracking technologies are insufficient, such as on mobile devices, brokers turn to other methods to profile users. Some invoke an individual's unique mobile device identifier, which can also track and profile that individual across multiple devices. Allison Schiff, *A Marketer's Guide to Cross-Device Identity*, AdExchanger (Apr. 9, 2015), http://adexchanger.com/data-exchanges/a-marketers-guide-to-cross-device-identity. These techniques, however, have not been standardized, meaning data collected in this way is often inaccurate. Mobile location data is particularly inaccurate. *See, e.g.*, Steven Jacobs, *Report: More Than Half of Mobile Location Data Is Inaccurate*, StreetFight (May 14, 2015), http://streetfightmag.com/2015/05/14/report-more-than-half-of-mobile-location-data-is-inaccurate.

Through online data mining, brokers acquire a lot of personal data through automated processes. Brokers typically mine data from publicly available online sources with "web crawlers, which are programs that capture content across the Internet and transmit it back to the data broker[]." FTC Report, at 17. For example, they may mine social media sites such as Facebook and LinkedIn, where individuals upload a great deal of information about what they do, what they like, what their political views are, as well as photos and videos to share with their friends, family, or colleagues. *See, e.g.*, *Data Provider PeekYou Leverages SpatialKey to Maximize Sales and Help*

Clients Better Understand their Customers' Social Media Activity, SpatialKey, https://www.spatialkey.com/assets/pdf/Market_Intelligence/SpatialKey__PeekYou_Case_Study.pdf ("PeekYou [offers a data-mining service that] analyzes activity on social networks and other public websites and then builds detailed profiles of the individuals behind that activity. PeekYou's profiles include the ages, locations, incomes, and interests of more than 250 million people."). Brokers also use data mining techniques on sites that collect information through registration sites and blogs. FTC Report, at 13. This kind of collection is known as "active" collection because the individual actively provides the information. *Policy on Passive Electronic Data Collection*, *supra* at 2. Typically, however, the individual provides the information for one purpose, such as ordering a book or sharing pictures of their dog with family, and are not aware that this information is mined by brokers for other purposes. *See* Daniel Solove, *Introduction: Privacy Self-Management and the Consent Dilemma*, 126 Harv. L.Rev. 1880, 1902 (2013) ("data can potentially be used in harmful ways that people might not be able to anticipate or understand.").

Brokers increasingly collect data, such as purchase and warranty data, from offline sources. FTC Report, at 1-2, 27. Offline data are tremendously valuable because offline activities can provide further insight into individuals' purchasing habits or even voting record. Lois Beckett, *Everything We Know About What Data Brokers Know About You*,

ProPublica (June 13, 2014), https://www.propublica.org/article/everything-we-know-about-what-data-brokers-know-about-you. Brokers continually merge that offline data with online data, the combination of which the broker sells. FTC Report, at 27; *see also Neustar CRM Onboarding*, Neustar, https://www.neustar.biz/resources/product-literature/crm-onboarding-solution-sheet.

Brokers amass enormous data sets from hundreds of sources, but those data are not guaranteed to be accurate and in fact can be very inaccurate. Experian, a broker, released a study recently finding a "high degree of inaccurate information" contained in broker databases, with U.S. organizations claiming that thirty-two percent of their data is inaccurate. *New Experian Data Quality Research Shows Inaccurate Data Preventing Desired Customer Insight*, PR NewsWire (Jan. 28, 2015), http://www.prnewswire.com/news-releases/new-experian-data-quality-research-shows-inaccurate-data-preventing-desired-customer-insight-300025513.html; *see also* Erin Haselkorn, *The Biggest Data Quality Challenges*, Experian (June 10, 2014), http://www.experian.com/blogs/marketing-forward/2014/06/10/the-biggest-data-quality-challenges. Even government data can be inaccurate, which in one case led to likely incorrect Congressional testimony because data was not transferred to the right people. Katherine Barrett & Richard Greene, *The Causes, Costs and Consequences of Bad Government Data*, Governing (June 24, 2015), http://www.governing.com/topics/mgmt/gov-bad-data.html.

Studies have also shown that profiles often misrepresent the individual. A 2014 study of eight online profiles found that "[a]ll profiles had errors to varying degrees." One participant's profile overstated his situation by claiming that, similar to Robins, "the participant was affluent with 350000+ income, had top 1% credit and owned [an] American Express card." Ashwini Rao, *et al.*, *What Do They Know About Me?*, 2014 Harvard ASE Conference, http://www.ase360.org/bitstream/handle/123456789/191/P39.pdf, at 7. *See also* Maureen Mahoney, *Errors and Gotchas*, Consumers Union (Apr. 9, 2014), http://consumersunion.org/wp-content/uploads/2014/04/Errors-and-Gotchas-report.pdf (describing credit reporting errors that are "too common"). The news media has also exposed inaccurate data collected by brokers, including Spokeo. Lindsay Riddell, *Spokeo: What Do They Know About You?*, S.F. Bus. Times (Jan. 13, 2011), http://www.bizjournals.com/sanfrancisco/blog/2011/01/remove-yourself-from-spokeo.html ("Spokeo says I am single. (News to my husband). Spokeo says I live with my parents. (Not for a very long time). Spokeo says I am a male. (Untrue for multiple provable reasons). Spokeo says I've lived in my house for 1 year. (I've lived there for three)."). These data may never be corrected because brokers may never have to update their data after initial collection. FTC Report, at 18.

For purposes of showing that data can often be inaccurate, counsel for CDD obtained his profile from Acxiom at "Aboutthedata.com." The profile for Eric G. Null misrepresented, among other things, that he has

only a high school education, even though he has graduated law school, and owns a home with a market value of $500,000-$749,999, when he in fact rents an apartment.

"With so much information coming from so many sources, it is inevitable that errors arise in" data collection. Gary Anthes, *Data Brokers Are Watching You*, 58 Comms. of the ACM 28 (Jan. 2015), http://cacm.acm.org/magazines/2015/1/181629-data-brokers-are-watching-you/fulltext. Unfortunately, individuals are unlikely to have the ability to correct inaccurate data about them.

3. Individuals generally cannot correct errors in data held by brokers.

As established above, brokers collect a significant amount of inaccurate data, which is used to make sensitive decisions about them. Rarely, however, can an individual access their complete profile or correct errors.

Some brokers have attempted to be transparent about the data they collect, but those attempts have been inadequate. For example, Acxiom created the site "Aboutthedata.com" for individuals to view data the company has collected about them. This site, however, provides consumers access to only "raw" data (e.g., name, address, income), not segments or derived data, Senate Report, at 34, which are often the most problematic elements. *See* FTC Report, at 42 ("data brokers typically provide access to raw data

and not to their proprietary information that they derive through algorithms.").

Other entities have not attempted to be transparent. Experian and Equifax provide no right to view or correct data collected by them because they claim their data is "anonymized," meaning they remove identifying information such as the individual's name. Senate Report, at 33-34. However, anonymizing data has failed to protect individuals against being identified. Researchers have shown that "third part[ies] could match browsing histories [likely stored in cookies] against identified datasets to re-identify them." Jonathan Mayer & John Mitchell, *Third-Party Web Tracking: Policy and Technology*, 2012 IEEE Symposium on Security and Privacy 413, 416, http://ieeexplore.ieee.org/stamp/stamp.jsp?tp=&arnumber=6234427.

Data about individuals are often collected for one purpose and sold for another, which is difficult for an individual to understand and predict. For instance, Whitepages.com says it collects data from third-party data suppliers, which may include data from "contests, sweepstakes, subscriptions or other similar offers." *Where Do You Get Your Information From*, Whitepages (Oct. 22, 2014), https://support.whitepages.com/hc/en-us/articles/203263894-Where-do-you-get-your-information-from. The individuals that disclose their data in those contexts (offline and for a specific purpose, namely, entering a contest) likely do not understand their data will be sold to Whitepages.com and other third parties for anyone online to find.

Solove, *supra*, at 1902 (stating there may be "[n]ew ideas for combining data, new discoveries in data aggregation and analysis, and new techniques and technologies of data analysis . [that may] potentially be used in harmful ways that people might not be able to anticipate or understand.").

Without a meaningful ability to correct data, individuals cannot protect themselves or ensure their data are accurate.

B. Brokers use compiled data to profile individuals algorithmically and sell those profiles for a variety of purposes.

Brokers put their data to a variety of uses, but first have to compile the data they have collected into very detailed profiles. The underlying data in these profiles are then passed through algorithms that ultimately determine into what "segments" the individual will be placed or how they will be classified, such as if the individual needs a loan or purchases fast food. Then, brokers can sell these profiles or lists of individuals for marketing, risk mitigation, and people search purposes.

1. Brokers compile data about individuals into detailed profiles and place those individuals into "segments" based on those profiles.

Brokers compile data about specific individuals into profiles. The aggregated or consolidated data points create a rich picture of who the individual is.

Brokers curate their data through derived data elements (discussed above) and by assigning individuals to certain "segments" based on the actual and derived data elements in their profile. FTC Report, at 19. Many segments are designed to target financially vulnerable populations: X-tra Needy; Zero Mobility; Hard Times; Enduring Hardships; Small Town Shallow Pockets; Burdened by Debt: Singles; Rural and Barely Making It; and Financially Challenged. Senate Report, at 24; FTC Report, at 21. Some segments focus on other characteristics: Downtown Dwellers; Plus-size Apparel; Bible Lifestyle; Latchkey Leasers; and others. FTC Report, at 20 n.52 & 21. Segments are often defined; for example, Experian defines "Hard Times" in part as "the bottom of the socioeconomic ladder, the poorest lifestyle segment in the nation." Senate Report, at 25.

Once brokers assign segments to individuals, they can create lists of individuals believed to have those traits or to exhibit those predicted behaviors. These lists are then sold to third parties. For instance, a bank may want to know whether any of its customers are on the "Financially Challenged" or "Hard Times" list before they make an online offer for a credit card at an attractive interest rate or target someone for a high-cost student loan for a private college. *Private For-Profit Colleges and Online Lead Generation: Private Universities Use Digital Marketing to Target Prospects, Including Veterans, via the Internet*, Center for Digital Democracy (May 2015),

https://www.democraticmedia.org/article/private-profit-colleges-and-online-lead-generation.

Brokers handle immense data sets, analysis of which is beyond the means of any human. Therefore, brokers rely extensively on "algorithms" that are processed via computers. Algorithms, which are essentially a series of automated steps applied to data, analyze data sets, identify patterns and relationships (correlations), generate categories for filtering information (segments), and otherwise help in analyzing vast amounts of data. *Big Data: Seizing Opportunities, Preserving Values*, White House at 46 (May 2014), https://www.whitehouse.gov/sites/default/files/docs/big_data_privacy_report_may_1_2014.pdf. Algorithmically assigning segments based on inaccurate data can have serious consequences for individuals because third parties, such as employers and marketers, make sensitive decisions about individuals based on those segments

2. Brokers sell profiles, including segments, for numerous purposes.

Brokers sell their data for many purposes, including marketing, verification of an individual's identity,[3] and "people search." Brokers have devised several marketing-related products designed to target individuals or grow marketing campaigns. One

[3] This brief will not focus on sale of data for identity verification.

product is "data append," where a client seeks a more complete profile of its customers, which a broker can provide, for traditional or online marketing purposes. FTC Report, at 24, 26. Further, through a process called "onboarding," brokers can load offline data into a browser cookie "to enable advertisers to target consumers" with advertisements based on offline activity. FTC Report, at 27. Brokers can also provide analytics that attempt to predict individuals' likely behavior. Analytics can also be used to "score" (like a credit score) certain individuals based on "how likely they are to respond to particular marketing efforts" or whether an individual has a low purchase rate. FTC Report, at 31. These methods create highly individualized and targeted marketing campaigns.

Profiles are relevant to auctioning online advertisements. Advertisers buy the right to serve an advertisement to a specific individual in real-time through auctions. These decisions are often made based on the profile of and segments assigned to the individual. The entire auction process takes less than fifty milliseconds. *Real-Time Media Buying: Advertise Online in a Smarter and More Efficient Way*, Exact Drive, http://www.exactdrive.com/real-time-media-buying. The speed at which advertisers purchase the right to advertise gives consumers even less control over how companies use their data.

Brokers can also sell their profiles for use with "people search" products, which is a product Spokeo provides. "People search" companies collect substantial

personal information about individuals, such as social security number, marriage or divorce records, and employment history, from a variety of sources. Then, they release that information in compiled form online for anyone to see. FTC Report, at 34. People may visit these sites to find out information about their friends or relatives, or employers could use these databases to gain more information about applicants. Many "people search" services, including Spokeo, tell their users not to use their data for "purposes governed by the FCRA, including eligibility for employment, credit, insurance, housing, or similar purposes." FTC Report, at 35; *see also* Complaint at 5, *United States v. Spokeo, Inc.*, No. CV12-05001-MMM-SH (C.D. Cal. June 7, 2012), https://www.ftc.gov/sites/default/files/documents/cases/2012/06/120612spokeocmpt.pdf. However, as discussed below, those uses occur nonetheless, and a simple disclaimer is insufficient to avoid causing significant harm.

C. Individuals experience real harm when decisions are made about them based on inaccurate information.

In addition to the uses above, data are used in employment and advertising contexts. Further, these data can be used to engage in discrimination based on protected classes such as race. Because many companies use data to make sensitive and personal decisions, data must be accurate or else these individuals will experience substantial harm.

1. Employers use profiles, algorithms, and online sources to make hiring decisions, which can be based on inaccurate information and can harm individuals.

Employers have increasingly relied on profiles, algorithms, and online sources in hiring. These services reduce costs in the hiring process and help employers gain insight into and information about applicants via automated screening. *E.g.*, Leigh Buchanan, *Unemployment Is Up. Why Is It So Hard to Find the Right Hires?*, Inc. (June 1, 2012), http://www.inc.com/leigh-buchanan/hiring-recruiting-unemployment-wharton-peter-cappelli.html. However, these efforts can have unintended consequences for individuals seeking employment. For example, "[v]eterans have complained that they were automatically disqualified for civilian jobs because [algorithms] didn't recognize the skills they learned in the military." Elizabeth Dwoskin, *How Social Bias Creeps Into Web Technology*, Wall St. J. (Aug. 21, 2015), http://www.wsj.com/article_email/computers-are-showing-their-biases-and-tech-firms-are-concerned-1440102894-lMyQjAxMTI1NzI3NjMyNjY2Wj. Further, "Carnegie Mellon University researchers examining Google's ad-targeting system recently found that male Web users were six times more likely than female users to be shown ads for high-paying jobs." *Id.* These decisions, made by algorithms, have significant effects on an individual's ability to obtain a job and may result in long term unemployment.

Even if a human reviews data about an applicant, inaccurate data can still lead to adverse decisions that harm individuals. Employers rely on publicly available sources online and often obtain background checks and review credit reports. Alexander Reicher, *The Background of Our Being: Internet Background Checks in the Hiring Process*, 28 Berkeley Tech. L.J. 115, 118-20 (2013); Jeanne Sahadi, *Background Checks: What Employers Can Find Out About You*, CNN Money (Jan. 5, 2015), http://money.cnn.com/2015/01/05/pf/background-checks; Lea Shepard, *Seeking Solutions to Financial History Discrimination*, 46 Conn. L. Rev. 993, 1005 (Feb. 2014). Credit reports, in particular, are heavily relied upon. However,

> [j]ob applicants with adverse credit histories – those that reflect collection actions, bankruptcies, or high debt-to-income ratios – are at a competitive disadvantage. Employers are prone to make a multitude of negative assumptions about such individuals: they are more likely to be irresponsible, more likely to commit fraud or theft on the job, more susceptible to bribery and blackmail, or more likely to be distracted by financial worries or collection activity.

Shepard, *supra*, at 996. Thus, "a job applicant would be wise to scrutinize his report in advance of an employer's formal vetting process to ensure that no information in the report is incomplete or inaccurate." *Id.* at 995. If there are errors on an individual's credit report, employers are likely to find out and may make

negative inferences about the individual to his or her detriment. As discussed above, data stored in a broker's database is virtually inaccessible and individuals likely cannot access their profiles to correct any errors.

Algorithmic discrimination based on protected classes likely occurs in employment. "[A]lgorithms can obscure discrimination," can "sort[ ] resumes according to fuzzy, non-transparent criteria," and may make "correlations between protected-class characteristics like race or sex, and the traits that predict employee success." Alex Rosenblat *et al.*, *Networked Employment Discrimination*, Data & Society Research Inst., http://www.datasociety.net/pubs/fow/EmploymentDiscrimination.pdf at 9. For example, discrimination can result by use of proxies – using data that is roughly correlated to race or gender. ZIP Codes can correlate to race, which means algorithms, or even humans, may discriminate based on race simply by removing certain ZIP Codes from their applicant pool. Katherine Noyes, *Will Big Data Help End Discrimination – or Make It Worse?*, Fortune (Jan. 15, 2015), http://fortune.com/2015/01/15/will-big-data-help-end-discrimination-or-make-it-worse. Xerox used to filter its applicants for commute time which "could put applicants from minority neighborhoods at a disadvantage in the hiring process." Dwoskin, *supra*. These and similar filtering decisions, which may seem innocuous, could effectively filter out certain races or genders. If the algorithm or employer relies on inaccurate data about race, gender, disability, or even

proxies such as ZIP Code, the repercussions for that individual can be significant.

Individuals experience harm when decisions about their employment are made based on inaccurate data. However, this is not the only context in which inaccurate data can be used to harm individuals.

2. Individuals experience harm by being targeted with ads based on race or similarly sensitive characteristics.

Brokers and the advertising industry are inextricably linked. As discussed above, brokers provide data to support targeted advertising and can help companies target consumers in countless ways. Many segments are specifically designed to target advertising to individuals based on traits and predicted behaviors. FTC Report, at 19. Targeting individuals based on inaccurate data, however, can significantly harm consumers.

Advertising suffers from discrimination in data collection and use. Latanya Sweeney, a Harvard University Professor and former FTC Technologist, released a study in 2012 concluding that, while using Google AdSense and InstantCheckmate.com, searches for names typically associated with African-Americans were more likely to display ads with "arrest" in the text than searches for names typically associated with White people. Latanya Sweeney,

Discrimination in Online Ad Delivery, Data Priv. Lab (Jan. 28, 2013), http://dataprivacylab.org/projects/onlineads/1071-1.pdf, at 34. This study stands for the proposition that algorithms can reflect biases and inaccurate stereotypes that pervade society, and thus perpetuate them. The most obvious harm resulting from this algorithmic misstep is giving the likely false impression (to employers, friends, or anyone who Google-searches the name) that the individual has been arrested, which can automatically remove that individual from consideration for many benefits.

Further, marketers harm consumers by targeting ads for less desirable products and services such as payday loans. Ed Mierzwinski & Jeff Chester, *Selling Consumers Not Lists: The New World of Digital Decision-Making and the Role of the Fair Credit Reporting Act*, 46 Suffolk L.Rev. 845, 849 (2013); Nathan Newman, Comments, *How Big Data Enables Economic Harm to Consumers, Especially to Low-Income and Other Vulnerable Sectors of the Population*, FTC Workshop, Big Data: A Tool for Inclusion or Exclusion?, https://www.ftc.gov/system/files/documents/public_comments/2014/08/00015-92370.pdf. For instance, an individual with a relatively low-income, or who may live in a particular low-income ZIP Code, may receive targeted advertisements for payday loans when that individual could otherwise qualify for more favorable terms. This may have serious consequences for the consumer because payday loans have extremely high interest rates and often target minorities and low-income households. Raúl Arce-Contreras, *A Word*

of Caution on Payday Loans, Center for Am. Progress (Apr. 7, 2009), https://www.americanprogress.org/issues/regulation/news/2009/04/07/5850/a-word-of-caution-on-payday-loans.

Thus, individuals clearly experience substantial harm as a result of dissemination of inaccurate information about them.

CONCLUSION

Brokers and other companies constantly collect, use, and sell online and offline data about individuals that help third parties make millions of data-driven decisions in sensitive contexts such as employment, marketing, and finance. Any such decision based on inaccurate data is very likely to cause serious harm to that individual.

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REPLY BRIEF

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SPOKEO, INC.,

Petitioner,

v.

THOMAS ROBINS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE AMERICAN HOTEL & LODGING ASSOCIATION, THE AMERICAN TORT REFORM ASSOCIATION, THE INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL, THE NATIONAL ASSOCIATION OF MANUFACTURERS, AND THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF THE *AMICI CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 4

ARGUMENT 8

I. STATUTORY INJURY-IN-LAW IS NO SUBSTITUTE FOR ARTICLE III INJURY-IN-FACT 8

II. ABANDONING ARTICLE III INJURY-IN-FACT WOULD INVITE ABUSIVE CLASS-ACTION LITIGATION 12

III. THE FCRA SHOULD BE CONSTRUED TO AVOID CONFLICT WITH ARTICLE III 27

CONCLUSION 33

TABLE OF AUTHORITIES

Page(s)

Cases

ACLU v. *Albuquerque*,
188 P.3d 1222 (N.M. 2008) 32

Allen v. *Wright*, 468 U.S. 737 (1984) 4, 5, 8, 11

Amchem Prods., Inc. v. *Windsor*,
521 U.S. 591 (1997) 15

Ariz. Christian Sch. Tuition Org. v. *Winn*,
131 S. Ct. 1436 (2011) 26

Arizona v. *Inter Tribal Council of Ariz., Inc.*,
133 S. Ct. 2247 (2013) 27

ASARCO Inc. v. *Kadish*,
490 U.S. 605 (1989) 29, 30

AT&T Mobility LLC v. *Concepcion*,
131 S. Ct. 1740 (2011) 23

Bateman v. *Am. Multi-Cinema, Inc.*,
623 F.3d 708 (9th Cir. 2010) 17

Bateman v. *Am. Multi-Cinema, Inc.*,
No. 2:07-CV-00171-FMC-AJWX,
Docket No. 114 (C.D. Cal. Oct. 11, 2011) 18

Beaudry v. *TeleCheck Servs., Inc.*,
579 F.3d 702 (6th Cir. 2009) 14

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No. CV 07-0559 GPS (JWJx),
2008 WL 239658 (C.D. Cal. Jan. 10,
2008) 22

TABLE OF AUTHORITIES—cont'd

Page(s)

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134 S. Ct. 2077 (2014) 27, 28

Carter v. *Mont. Dep't of Transp.*,
905 P.2d 1102 (Mont. 1995) 31

Chakejian v. *Equifax Info. Servs., LLC*,
256 F.R.D. 492 (E.D. Pa. 2009) 16

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542 F. Supp. 2d 831 (N.D. Ill. 2008) 18

Cincinnati City Sch. Dist. v. *State Bd. of Educ.*, 680 N.E.2d 1061 (Ohio 1996) 31

Clark v. *Martinez*, 543 U.S. 371 (2005) 29

Coleman v. *Sopher*,
459 S.E.2d 367 (W. Va. 1995) 32

Coopers & Lybrand v. *Livesay*,
437 U.S. 463 (1978) 23

Dover Historical Soc'y v. *City of Dover Planning Comm'n*,
838 A.2d 1103 (Del. 2003) 30

Dowell v. *Wells Fargo Bank, NA*,
517 F.3d 1024 (8th Cir. 2008) 28

Elk Grove Unified Sch. Dist. v. *Newdow*,
542 U.S. 1 (2004) 4

Evans v. *U-Haul Co. of Cal.*,
No. CV 07-2097-JFW, 2007 WL 7648595
(C.D. Cal. Aug. 14, 2007) 23

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Page(s)

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87 So. 3d 502 (Ala. 2011) 30

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524 U.S. 11 (1998).....9

Feminist Women's Health Ctr. v. *Burgess*,
651 S.E.2d 36 (Ga. 2007) 31

Fernandez v. *Takata Seat Belts, Inc.*,
108 P.3d 917 (Ariz. 2005).....33

Frisby v. *Schultz*,
487 U.S. 474 (1988).....27

Gladstone, Realtors v. *Vill. of Bellwood*,
441 U.S. 91 (1979).....6, 8, 10

Glisson v. *City of Marion*,
720 N.E.2d 1034 (Ill. 1999).....31

Godfrey v. *State*,
752 N.W.2d 413 (Iowa 2008)..... 30-31

Hammer v. *Sam's East, Inc.*,
754 F.3d 492 (8th Cir. 2014).....28

Harris v. *Experian Info. Solutions, Inc.*,
No. 6:06-cv-1808-GRA,
Docket No. 201 (D.S.C. June 30, 2009) 17

Hoffmann-La Roche Inc. v. *Sperling*,
493 U.S. 165 (1989).....26

In re Facebook Privacy Litig.,
791 F. Supp. 2d 705 (N.D. Cal. 2011).....21

TABLE OF AUTHORITIES—cont'd

Page(s)

Jerman v. *Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573 (2010) 20

Jerman v. *Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, No. 1:06-cv-1397, 2011 WL 1434679 (N.D. Ohio Apr. 14, 2011) 20

Jerman v. *Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, No. 1:06-cv-1397-PAG, Docket No. 62-1 (N.D. Ohio May 3, 2011) 20

Jerman v. *Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, No. 1:06-cv-1397-PAG, Docket No. 88-1 (N.D. Ohio Dec. 13, 2011) 20

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Kesler v. *Ikea U.S. Inc.*, No. SACV 07-568 JVS (RNBx), 2008 WL 413268 (C.D. Cal. Feb. 4, 2008) 18

Lexmark Int'l, Inc. v. *Static Control Components, Inc.*, 134 S. Ct. 1377 (2014) 4

Lopez v. *KB Toys Retail, Inc.*, No. CV 07-144-JFW (CWx), 2007 U.S. Dist. LEXIS 82025 (C.D. Cal. July 17, 2007) 18, 22

Lujan v. *Defenders of Wildlife*, 504 U.S. 555 (1992) ..... *passim*

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Page(s)

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549 U.S. 497 (2007) 9, 10

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No. SACV 07-0506 JVS (RNBx), 2007
WL 4592113 (C.D. Cal. Oct. 15, 2007) 19

Murray v. *GMAC Mortg. Corp.*,
434 F.3d 948 (7th Cir. 2006) 23

Nw. Austin Mun. Util. Dist. No. One v.
Holder, 557 U.S. 193 (2009) 7

O'Shea v. *Littleton*, 414 U.S. 488 (1974) 5

Parker v. *Time Warner Enter. Co., L.P.*,
631 F Supp. 2d 242 (E.D.N.Y. 2009) 21

Pierce v. *San Mateo County Sheriff's Dept.*,
232 Cal. App. 4th 995 (Cal. Ct. App.
2014) 29

Pippen v. *State*, 854 N.W.2d 1 (Iowa 2014) 29

Pub. Citizen v. *U.S. Dep't of Justice*,
491 U.S. 440 (1989) 8-9, 27

Raines v. *Byrd*, 521 U.S. 811 (1997) 6

Save the Pine Bush, Inc. v. *Common Council*
of the City of Albany, 918 N.E.2d 917
(N.Y. 2009) 31

Schlesinger v. *Reservists Comm. to Stop the*
War, 418 U.S. 208 (1974) 4, 5, 8

TABLE OF AUTHORITIES—cont'd

Page(s)

Sea Pines Ass'n for the Protection of Wildlife, Inc. v. *S.C. Dep't of Natural Res.*, 550 S.E.2d 287 (S.C. 2001).....31

Shady Grove Orthopedic Assocs., P.A. v. *Allstate Ins. Co.*, 559 U.S. 393 (2010).....23

Sierra Club v. *Dep't of Transp.*, 167 P.3d 292 (Haw. 2007).....32

Sierra Club v. *Morton*, 405 U.S. 727 (1972).....8

Specht v. *Netscape Commc'ns Corp.*, 150 F. Supp. 2d 585 (S.D.N.Y. 2001), *aff'd*, 306 F.3d 17 (2d Cir. 2002).....19

Specht v. *Netscape Commc'ns Corp.*, Nos. 1:00-CV-4871, *et al.*, Docket No. 94 (S.D.N.Y. Apr. 22, 2005), *aff'd sub nom. Weindorf* v. *Netscape Commc'ns Corp.*, 173 F. App'x 44 (2d Cir. 2006).....20

Specht v. *Netscape Commc'ns Corp.*, Nos. 1:00-CV-4871, *et al.*, 2000 WL 34500293 (S.D.N.Y. Aug. 3, 2000).....19

Specht v. *Netscape Commc'ns Corp.*, Nos. 1:00-CV-4871, *et al.*, 2004 WL 5475796 (S.D.N.Y. Sept. 2, 2004).....19

State Bank of Cherry v. *CGB Enters., Inc.*, 984 N.E.2d 449 (Ill. 2013).....29

State v. *Maddox*, 825 N.W.2d 140 (Minn. 2013).....29

TABLE OF AUTHORITIES—cont'd

Page(s)

Steel Co. v. *Citizens for a Better Env't*,
523 U.S. 83 (1998) 5, 8, 12

Summers v. *Earth Island Inst.*,
555 U.S. 488 (2009) 5, 6, 10

Taylor v. *Acxiom Corp.*,
612 F.3d 325 (5th Cir. 2010) 21

Tex. Ass'n of Bus. v. *Tex. Air Control Bd.*,
852 S.W.2d 440 (Tex. 1993) 32

Town of Parker v. *Milton*,
726 A.2d 477 (Vt. 1998) 30

Toxic Waste Impact Grp., Inc. v. *Leavitt*,
890 P.2d 906 (Okla. 1994) 30

Trafficante v. *Metro. Life Ins. Co.*,
409 U.S. 205 (1972) 8

Trans Union LLC v. *FTC*,
536 U.S. 915 (2002) 14

Troy v. *Red Lantern Inn, Inc.*,
No. 07 C 2418, 2007 WL 4293014
(N.D. Ill. Dec. 4, 2007) 18

United States v. *Sec. Indus. Bank*,
459 U.S. 70 (1982) 27

US Fax Law Ctr., Inc. v. *iHire, Inc.*,
362 F. Supp. 2d 1248 (D. Colo. 2005) 14

Utah Chapter of Sierra Club v. *Utah Air Quality Bd.*, 148 P.3d 960 (Utah 2006) 32

TABLE OF AUTHORITIES—cont'd

Page(s)

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Vt. Agency of Natural Res. v. *United States ex rel. Stevens*, 529 U.S. 765 (2000) 12

Wal-Mart Stores, Inc. v. *Dukes*, 131 S. Ct. 2541 (2011) 15

Wallace v. *ConAgra Foods, Inc.*, 747 F.3d 1025 (8th Cir. 2014) 28

Wasden v. *State Bd. of Land Comm'rs*, 280 P.3d 693 (Idaho 2012) 30

Weindorf v. *Netscape Commc'ns Corp.*, 173 F. App'x 44 (2d Cir. 2006) 20

White v. *E-Loan, Inc.*, No. C 05-02080, 2006 WL 2411420 (N.D. Cal. Aug. 18, 2006) 16

Statutes

2 U.S.C. § 437g(a)(1) 9

12 U.S.C. § 4907(a)(2) 13

15 U.S.C. § 1116(d) 13

15 U.S.C. § 1125(d) 13

15 U.S.C. § 1640(a)(2) 13

15 U.S.C. § 1681c(g) 17

TABLE OF AUTHORITIES—cont'd

Page(s)

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE AMERICAN HOTEL & LODGING ASSOCIATION, THE AMERICAN TORT REFORM ASSOCIATION, THE INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL, THE NATIONAL ASSOCIATION OF MANUFACTURERS, AND THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and has an underlying membership of more than three million businesses and organizations of every size, in every industry, sector, and geographic region of the country—making it the principal voice of American business.

The American Hotel & Lodging Association ("AH&LA") is the sole national association representing all segments of the 1.8-million-employee U.S. lodging industry, including hotel owners, real estate investment trusts (REITs), chains, franchisees, management companies, independent properties, state

[1] The parties consented to the filing of this brief, and written documentation of their consent is being submitted concurrently. No counsel for a party wrote this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae*, their members, or their counsel made a monetary contribution intended to fund its preparation or submission.

hotel associations, and industry suppliers. The mission of AH&LA is to be the voice of the lodging industry, its primary advocate, and an indispensable resource. AH&LA serves the lodging industry by providing representation at the national level and in government affairs, education, research, and communications. AH&LA also represents the interests of its members in litigation raising issues of widespread concern to the lodging industry.

The American Tort Reform Association (the "ATRA") is a broad-based coalition of more than 170 businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote a civil justice system that produces fairness, balance, and predictability in civil litigation. The ATRA's members have a substantial interest in ensuring that courts follow constitutional and traditional tort-law principles.

The International Association of Defense Counsel (the "IADC") is an association of corporate and insurance attorneys from the United States and around the globe whose practice is concentrated on the defense of civil lawsuits. It is dedicated to the just and efficient administration of civil justice and continual improvement of the civil justice system. The IADC supports a justice system in which plaintiffs are fairly compensated for genuine injuries, responsible defendants are held liable for appropriate damages, and non-responsible defendants are exonerated without unreasonable cost.

The National Association of Manufacturers (the "NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs over 12 million

men and women, contributes roughly $2.1 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for two-thirds of private-sector research and development. The NAM's mission is to enhance the competitiveness of manufacturers and improve American living standards by shaping a legislative and regulatory environment conducive to U.S. economic growth.

The National Federation of Independent Business ("NFIB") is the Nation's leading small business advocacy association, representing more than 350,000 member businesses in all fifty States and the District of Columbia. NFIB's members range from sole proprietors to firms with hundreds of employees, and collectively they reflect the full spectrum of America's small business owners. Founded in 1943 as a nonpartisan organization, NFIB defends the freedom of small business owners to operate and grow their businesses and promotes public policies that recognize and encourage the vital contributions that small businesses make to our national economy.

Amici regularly advocate for the interests of their members in federal and state courts throughout the country in cases of national concern. This is one such case. The decision below conflates injury-in-law with injury-in-fact, and effectively holds that Congress can circumvent the minimum requirements for standing under Article III of the Constitution. This is of grave concern to the business community. As this case illustrates, alleged technical violations of regulatory statutes can often affect large numbers of people without actually injuring them. If such people can nevertheless bring lawsuits—without the need to demonstrate any injury beyond the alleged statutory violation itself—businesses will predictably be tied up in damages litigation over harmless al-

leged lapses, diverting their resources from more productive uses. *Amici* urge the Court to restore proper Article III limitations and rein in abusive no-injury lawsuits over such regulatory trifles.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Ninth Circuit's conflation of injury-in-law with injury-in-fact runs headlong into this Court's standing jurisprudence. A plaintiff cannot state a case or controversy under Article III without first establishing that he has standing to sue. *Allen* v. *Wright*, 468 U.S. 737, 750-751 (1984). "From Article III's limitation of the judicial power to resolving 'Cases' and 'Controversies,' and the separation-of-powers principles underlying that limitation," this Court has "deduced a set of requirements that together make up the 'irreducible constitutional minimum of standing.'" *Lexmark Int'l, Inc.* v. *Static Control Components, Inc.*, 134 S. Ct. 1377, 1386 (2014) (quoting *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). "The plaintiff must [1] have suffered or be imminently threatened with a concrete and particularized 'injury in fact' that is [2] fairly traceable to the challenged action of the defendant and [3] likely to be redressed by a favorable judicial decision." *Ibid.* Each of the three requirements serves a different, critical role in "enforc[ing] the Constitution's case-or-controversy requirement." *Elk Grove Unified Sch. Dist.* v. *Newdow*, 542 U.S. 1, 11 (2004).

Injury-in-fact—*i.e.*, a "[c]oncrete injury, whether actual or threatened[—]is that indispensable element of a dispute which serves in part to cast it in a form traditionally capable of judicial resolution." *Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U.S. 208, 220-221 (1974). It is the "foremost" ele-

ment of the inquiry, *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 103 (1998); the one that "adds the essential dimension of specificity to the dispute by requiring that the complaining party have suffered a particular injury caused by the action challenged as unlawful," *Schlesinger*, 418 U.S. at 221. In doing so, it ensures "that the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Valley Forge Christian Coll.* v. *Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982); see also John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 DUKE L.J. 1219, 1224 (1993) ("The need to insist upon meaningful limitations on what constitutes injury for standing purposes * * * flows from an appreciation of the key role that injury plays in restricting the courts to their proper function in a limited and separated government.").

To establish standing, "the complaining party [is] required to allege a *specific* invasion of th[e] right suffered by him." *Schlesinger*, 418 U.S. at 224 n.14 (emphasis added). And that invasion must be "actual," "distinct," "palpable," and "concrete," and not "conjectural" or "hypothetical." *Allen*, 468 U.S. at 750-751, 756, 760 (internal quotation marks omitted). A mere "[a]bstract injury is not enough," *O'Shea* v. *Littleton*, 414 U.S. 488, 494 (1974), because injury-in-fact "is not an ingenious academic exercise in the conceivable * * * [but] requires * * * a factual showing of *perceptible harm*," *Summers* v. *Earth Island Inst.*, 555 U.S. 488, 499 (2009) (emphasis added and internal quotation marks omitted).

Furthermore, "the requirement of injury in fact is a hard floor of Article III jurisdiction that cannot

be removed by statute." *Summers*, 555 U.S. at 497. It has long been "settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing." *Raines* v. *Byrd*, 521 U.S. 811, 820 n.3 (1997) (citing *Gladstone, Realtors* v. *Vill. of Bellwood*, 441 U.S. 91, 100 (1979)). After all, a constitutional limit that can be conclusively satisfied by a statutory remedy is no constitutional limit at all. See Roberts, *supra*, 42 DUKE L.J. at 1227 ("a holding that Congress may override the injury limitation of Article III would [be] remarkable").

According to the Ninth Circuit, however, "alleged violations of [respondent's] statutory rights are sufficient to satisfy the injury-in-fact requirement of Article III." Pet. App. 8a; see also *id.* at 9a n.3 ("[W]e determine that [respondent] has standing by virtue of the alleged violations of his statutory rights."). Under that view, whenever Congress grants a monetary recovery to a person exposed to an abstract violation of law, that person also has *ipso facto* sustained an injury sufficient to support standing to sue in federal court. And because conflating injury-in-fact with injury-in-law effectively removes causation and redressability—as the court of appeals admitted, see *id.* at 9a—the holding below reduces the three-part standing inquiry to a single-factor test: Constitutional standing exists if some statutory remedy can be found.

The Ninth Circuit has lost sight of fundamental constitutional principles, and the significance of its error reaches far beyond this case. There are dozens of federal laws similar to the one at issue here, all of which could be read to authorize suit against businesses by plaintiffs who have suffered no actual, concrete, or particularized injury. No matter their size,

industry, or geographic location, businesses are subject to various technical legal duties. By the Ninth Circuit's logic, injury-in-fact (and with it causation and redressability) would no longer be a required element for standing in federal courts. With standing based solely on a technical statutory violation that could be identical for a large swath of potential plaintiffs, the traditional class-certification hurdles of commonality and predominance could be rendered meaningless, as well. As a result, businesses would be significantly more likely to face costly and cumbersome class actions seeking damages—sometimes annihilating damages—for conduct that caused concrete and particularized harm to only a handful of people or to no one at all. This is already taking place in lower courts. See pp. 12-22, *infra*.

Fortunately, this need not be so. The damages provision at issue here—in the Fair Credit Reporting Act (FCPA), 15 U.S.C. § 1681n(a)(1)(A)—says nothing about standing or no-injury suits. Its reference to statutory damages as an alternative to actual damages can and should be construed as just that—an alternative damages remedy that in no way seeks to supplant the baseline constitutional requirement that a plaintiff actually have suffered injury-in-fact to bring suit. Construing the statute in this manner would avoid the apparent conflict with Article III and comport with the "well-established principle governing the prudent exercise of this Court's jurisdiction that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case." *Nw. Austin Mun. Util. Dist. No. One* v. *Holder*, 557 U.S. 193, 205 (2009).

ARGUMENT

I. STATUTORY INJURY-IN-LAW IS NO SUBSTITUTE FOR ARTICLE III INJURY-IN-FACT

This Court has long emphasized the difference between a statutory violation (which does not *ipso facto* confer Article III standing) and a statutory violation that results in a concrete and particularized injury-in-fact (which *can* result in standing). Compare *Sierra Club* v. *Morton*, 405 U.S. 727 (1972), with *Trafficante* v. *Metro. Life Ins. Co.*, 409 U.S. 205, 209 (1972) (noting that "injury in fact to petitioners, the ingredient found missing in *Sierra Club* * * *, is alleged here").

Any power Congress may have to dispense with prudential limitations on standing, or to relax the requirements of redressability and immediacy, does not extend to relaxing the core constitutional requirement that injury-in-fact be concrete and particularized. "In no event * * * may Congress abrogate the Art. III minima." *Gladstone, Realtors*, 441 U.S. at 100. Congress can relax constitutional standards only where a plaintiff seeks "to protect his *concrete* interests." *Defenders of Wildlife*, 504 U.S. at 572 n.7 (emphasis added). A desire to seek "vindication of the rule of law * * * does not suffice" to establish standing. *Steel Co.*, 523 U.S. at 106; see also *Schlesinger*, 418 U.S. at 223 n.13 (denying standing for a claim of "the abstract injury in nonobservance of the Constitution"); *Allen*, 468 U.S. at 754 (same); Roberts, *supra*, 42 DUKE L.J. at 1230.

For that reason, this Court has gone to great lengths to identify concrete and particularized interests in support of standing. In *Public Citizen* v.

United States Dep't of Justice, 491 U.S. 440 (1989), for example, the Court held that plaintiffs had standing to challenge a denial of information, sought under the Federal Advisory Committee Act, about advice given by the American Bar Association ("ABA") to the Department of Justice concerning potential judicial nominees. The Court recognized standing *not* because the statute created a private right of action but because of the "distinct injury" *resulting from* the Department's "refusal to permit appellants to scrutinize the ABA Committee's activities to the extent FACA allows." *Id.* at 449.

Likewise, in *Federal Election Commission* v. *Akins*, 524 U.S. 11 (1998), the Court required a distinct injury—not just the "injury" from an alleged statutory violation—when it recognized standing for plaintiffs seeking relief under the Federal Election Campaign Act of 1971, which requires certain groups to disclose information about campaign involvement and which creates a private cause of action for "'[a]ny person who believes a violation of th[e] Act * * * has occurred,'" *id.* at 19 (quoting 2 U.S.C. § 437g(a)(1)). As in *Public Citizen*, the Court found the requisite concrete and particularized injury in the *consequences* of the statutory violation. Indeed, the Court expressly stated that a factual injury was a precondition for standing, *Akins*, 524 U.S. at 20, and that Congress was simply enabling remediation of that particular injury, *id.* at 24-25 ("the informational injury at issue here * * * is sufficiently concrete and specific").[2]

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[2] Similarly, in *Massachusetts* v. *EPA*, 549 U.S. 497 (2007), the Court did not base standing on the mere fact that Congress had conferred a cause of action on Massachusetts or had defined the effects of global warming to be an injury. Rather, it

All of this was lost on the Ninth Circuit. Although respondent included "sparse" (and implausible) allegations that inaccurate but favorable information on Spokeo's website caused him injury, Pet. App. 2a, the court of appeals brushed aside "whether harm to his employment prospects or related anxiety could be sufficient injuries in fact," *id.* at 9a n.3. It held instead "that [he] has standing by virtue of the alleged violations of his statutory rights" alone. *Ibid.* In the course of doing so, the court paid lip service to cases holding that "the Constitution limits the power of Congress to confer standing." *Id.* at 7a (discussing *Defenders of Wildlife*). But it nonetheless went on to hold that a statutory violation can *substitute* for an injury. See *id.* at 8a ("alleged violations of * * * statutory rights are sufficient to satisfy * * * Article III").

The Ninth Circuit thus applied this Court's standing precedent in a manner that leaves it almost bereft of force. Its sweeping holding rests on a misunderstanding of Congress's powers to define standing. Congress cannot declare that, so long as a plaintiff can state a claim under a statute, he was necessarily injured by the alleged violation of that statute. Although Congress has the power to "expand standing to the full extent permitted by Art. III," *Gladstone, Realtors*, 441 U.S. at 100 (internal quotation marks omitted), it *cannot* expand standing *beyond* the limits of Article III. The "requirement of injury in fact is a hard floor * * * that cannot be removed by statute." *Summers*, 555 U.S. at 497; see also Jonathan H. Adler, *Standing Still in the Roberts Court*,

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[Footnote continued from previous page]

emphasized the need for the plaintiff State to "allege[] a particularized injury in its capacity as a landowner." *Id.* at 522.

59 CASE W. RES. L. REV. 1061, 1063 (2009) ("Congress may tinker on the edges, but it cannot confer standing on parties that fail to meet the underlying constitutional requirements in a given case."). Congress cannot substitute statutory rights for injuries-in-fact that do not exist. As this Court held in *Defenders of Wildlife*, "[s]tatutory broadening of the categories of injury that may be alleged in support of standing is a different matter from abandoning the requirement that the party seeking review must himself have suffered an injury." 504 U.S. at 578 (discussing *Warth* v. *Seldin*, 422 U.S. 490, 500 (1975)) (internal punctuation and quotation marks omitted).

Injury-in-law without injury-in-fact does not pass muster under this Court's precedents or the Constitution. A party is not injured by another's mere (alleged) nonobservance of the law. Rather, injury-in-fact results from the *tangible consequences* of another's illegal acts—and here there were none. See, *e.g.*, *Valley Forge Christian Coll.*, 454 U.S. at 485 (holding that a putative plaintiff must identify a "personal injury suffered * * * *as a consequence* of the alleged" violation).

This is no minor matter. "Standing is built on a single basic idea—the idea of separation of powers," *Allen* v. *Wright*, 468 U.S. 737, 752 (1984), and the issue here strikes at the heart of that separation. If "alleged violations of [a plaintiff's] statutory rights [we]re sufficient to satisfy the injury-in-fact requirement of Article III," Pet. App. 8a—*i.e.*, if injury-in-law could substitute for injury-in-fact—Congress could essentially dictate access to the federal courts by removing the independent force of the case-or-controversy limitation. Without a requirement of an actual injury or a causal connection between that

nonexistent injury and the defendant's violation of a legal duty, the existence of a remedy would bootstrap into standing to pursue the remedy in federal court. See, *e.g.*, *id.* at 9a ("When the injury in fact is the violation of a statutory right * * *, causation and redressability will usually be satisfied.").

That radical result would sidestep this Court's standing jurisprudence in a substantial category of cases—a category limited in size only by legislative restraint or the limits of legislative ingenuity. It would conflate injury-in-fact with a legislative bounty—the kind of injury "that is merely a 'byproduct' of the suit itself," and that "cannot give rise to a cognizable injury in fact for Article III standing purposes." *Vt. Agency of Natural Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 773 (2000). It would license plaintiffs to "seek[] not remediation of [their] own injury * * * but vindication of the rule of law—the 'undifferentiated public interest' in faithful execution of [the law]," *Steel Co.*, 523 U.S. at 106—and in effect "transfer from the President to the courts the Chief Executive's most important constitutional duty, to 'take Care that the Laws be faithfully executed,' Art. II, § 3," *Defenders of Wildlife*, 504 U.S. at 577. That is neither what the Framers intended nor what the Constitution allows for the exercise of *judicial* power. See Roberts, *supra*, 42 DUKE L.J. at 1232.

II. ABANDONING ARTICLE III INJURY-IN-FACT WOULD INVITE ABUSIVE CLASS-ACTION LITIGATION

Allowing a technical statutory violation, standing alone, to replace injury-in-fact not only would upset settled constitutional law, but also would have very real practical consequences for the many corporate

defendants subjected to nuisance suits by putative class members who have suffered no actual harm. Unfortunately, the no-injury suit here is not unique. There have been—and will be—many others, involving the FCRA or any of dozens of statutes with similar statutory damages provisions,[3] where plaintiffs who suffered no tangible harm allege technical statutory violations. The vast majority of these cases are

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[3] These include the Anti-Counterfeiting Consumer Protection Act, 15 U.S.C. § 1116(d) (providing statutory damages of $1,000 to $200,000 per counterfeit activity, up to $2 million for a willful violation), Anti-Cybersquatting Consumer Protection Act, 15 U.S.C. § 1125(d) ($1,000 to $100,000 per bad-faith violation), Cable Piracy Act, 47 U.S.C. § 605(a) ($1,000 to $10,000 per violation, and $100,000 per willful violation), Cable Communications Privacy Act, 47 U.S.C. § 551(f)(2)(A) ($100 per day of violation or $1,000 per plaintiff), Electronic Communications Privacy Act (ECPA), 18 U.S.C. § 2707(c) ($1,000 per plaintiff, plus punitive damages if willful), Electronic Funds Transfer Act (EFTA), 15 U.S.C. § 1693m(a)(2)(A) ($100 to $1,000 per plaintiff), Fair and Accurate Debt Transactions Act (FACTA), 15 U.S.C. § 1681n ($1,000 per violation, plus punitive damages), Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. § 1692k(a)(2) ($1,000 per plaintiff, up to $500,000 or one percent of debt collector's net worth), Homeowner Protection Law, 12 U.S.C. § 4907(a)(2) ($2,000 per plaintiff, up to $500,000 or one percent of liable party's net worth), Migrant and Seasonal Agricultural Worker Protection Act (MSAWPA), 29 U.S.C. § 1854(c)-(e) ($500 per plaintiff per violation, up to $10,000 per plaintiff), Telephone Consumer Protection Act (TCPA), 47 U.S.C. § 227(b)(3)(B) ($500 per violation, trebled if willful), Truth in Lending Act (TILA), 15 U.S.C. § 1640(a)(2) ($500 to $5,000 per violation, up to one percent of debt collector's net worth), Worker Adjustment and Retraining Notification Act (WARN), 29 U.S.C. § 2104(a)(3) ($500 per violation).

brought as putative class actions,[4] often seeking damages in the millions or billions of dollars.[5]

The incentives created by the combination of detailed legislative oversight of business activity and judicial willingness to relax standing requirements has not gone unnoticed by the class-action bar. Just as substituting a statutory violation for injury-in-fact bootstraps causation and redressability for purposes of standing, see pp. 6-7, 11-12, *supra*; Pet. Br. 39, substituting a statutory violation for standing almost necessarily subsumes the class-certification analysis. In this way, the jettisoning of a meaningful injury-in-fact requirement—and with it a meaningful causation requirement, see Pet. Br. 39—removes some of the key constraints on class certification. If, after all, no injury beyond an alleged statutory violation is required, it would be unnecessary in many cases to separate the potentially injured from the set of all

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[4] The few that are not class actions might as well be. The plaintiff in *US Fax Law Ctr., Inc.* v. *iHire, Inc.*, 362 F. Supp. 2d 1248 (D. Colo. 2005), for example, is a company that aggregates unwanted faxes from individuals and companies to bring large-scale lawsuits on their behalf "to secure the dollar damages and penalties that are rightfully yours by law" under the Telephone Consumer Protection Act, 47 U.S.C. § 227(b). See http://www.stop-junk-fax-spam.com/services.html (last visited July 7, 2015).

[5] See, *e.g.*, *Beaudry* v. *TeleCheck Servs., Inc.*, 579 F.3d 702, 703-704 (6th Cir. 2009) (class representative seeking to represent "hundreds of thousands, if not millions," of Tennessee consumers, each of whom would be entitled to up to $1,000—for a total liability in the billions) (internal quotation marks omitted); see also *Trans Union LLC* v. *FTC*, 536 U.S. 915, 917 (2002) (Kennedy, J., dissenting from denial of cert.) ("Because the FCRA provides for statutory damages of between $100 and $1,000 for each willful violation, petitioner faces potential liability approaching $190 billion.").

persons with any identifiable connection to a statutory violation. The only issue that must be proved is an abstract violation of a legal duty, regardless of its widely varying or entirely absent effects on individual class members: Commonality under Fed. R. Civ. P. 23(a)(2) and predominance under Fed. R. Civ. P 23(b)(3) collapse into a single-issue inquiry.

"Commonality requires the plaintiff to demonstrate that the class members have suffered the same injury." *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541, 2551 (2011) (internal quotation marks omitted). Although this Court has emphasized that "[t]his does not mean merely that they have all suffered a violation of the same provision of law," *ibid.*, any distinction disappears if the Article III injury *is* a violation of the same provision of law.

Predominance—which gets at "whether proposed classes are sufficiently cohesive to warrant adjudication by representation"—"trains on the legal or factual questions that qualify each class member's case as a genuine controversy." *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 623 (1997). But that test, too, would almost always be satisfied if a common injury-in-fact exists merely by virtue of common exposure to the same injury-in-law. And this would occur without any need ever to consider individualized actual harm or causation.

With the requirements of commonality and predominance effectively relaxed to the point of nonexistence, class certification would often be nearly automatic: An assertion of a generalized injury-in-law would be the beginning and the end of the matter. This would lead to a perverse result: The ease with which a statutory violation can surmount the normal roadblocks of commonality and predominance

would encourage class counsel to forgo traditional claims based on actual injuries in favor of suits where the only injury common to class members is the defendant's alleged technical violation of a statute. Named plaintiffs would have an incentive to waive any claim for actual damages in an attempt to increase their chances of obtaining class certification on their statutory damages claims.

Enterprising class action attorneys have already caught on to this trick. See, *e.g.*, *Chakejian* v. *Equifax Info. Servs., LLC*, 256 F.R.D. 492, 499-500 (E.D. Pa. 2009) (named plaintiff "elect[ed] to forego actual damages"); *White* v. *E-Loan, Inc.*, No. C 05-02080, 2006 WL 2411420, at *2 (N.D. Cal. Aug. 18, 2006) (named plaintiff "willing to forego actual damages to seek only statutory damages"). Rather than litigate the alleged statutory violations in the context of the actual individual injuries they might cause, entrepreneurial class-action lawyers deliberately litigate their claims of statutory violations in the abstract to increase settlement amounts.[6] The resulting payouts amount to deadweight economic loss—a wealth transfer that overcompensates for nonexistent injuries and over-deters insubstantial regulatory violations, leading to wasteful expenditures aimed at punctilious compliance with technical statutory requirements.

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[6] Indeed, "[w]hat makes these statutory damages class actions so attractive to plaintiffs' lawyers is simple mathematics: these suits multiply a minimum $100 statutory award (and potentially a maximum $1,000 award) by the number of individuals in a nationwide or statewide class." Sheila B. Scheuerman, *Due Process Forgotten: The Problem of Statutory Damages and Class Actions*, 74 MO. L. REV. 103, 114 (2009).

In stark contrast to respondent's purported injury, the injuries inflicted upon businesses by the nonenforcement of constitutional standing requirements are anything but abstract. Those injuries are often most pronounced when the defendant did not even violate the statute at issue, or did so in only the most *de minimis* way. Take, for instance, *Harris* v. *Experian Info. Solutions, Inc.*, No. 6:06-cv-1808-GRA, Docket No. 201, at *4-5 (D.S.C. June 30, 2009), in which the plaintiff class claimed that credit reporting agencies violated the FCRA by failing to report consumers' credit limits for their Capital One credit cards—information that Capital One refused to provide to the agencies. The omission of credit-limit information hurt some consumers' credit scores, had no impact on certain others, and increased the credit scores of a very substantial third group. *Id.* at *3. Even though the named plaintiff had *benefited* from the alleged violation, he was certified to represent a class of more than four million consumers—which, at $100 to $1,000 per violation, sought aggregate statutory damages between $400 million and $4 billion. *Id.* at *5. Although defendants ultimately prevailed on the merits—the court held that omitting the information at issue did not violate the FCRA—they did so only after expending considerable resources to get to summary judgment (and at the risk of a potentially ruinous adverse judgment). *Id.* at *2.

Similarly, in *Bateman* v. *American Multi-Cinema, Inc.*, 623 F.3d 708 (9th Cir. 2010), which concerned a movie theater chain's alleged violation of amendments to the FCRA by the Fair and Accurate Credit Transactions Act (FACTA), 15 U.S.C. § 1681c(g) (2005), a putative class sought up to $290 million for the defendant's inclusion, on electronically printed receipts, of more than the last five digits of

the plaintiff class's credit or debit card numbers—even though the class suffered no harm from the practice.[7] The district court denied class certification on the ground that the alleged liability "was enormous and out of proportion to any harm suffered by the class." *Id.* at 710. But the Ninth Circuit reversed, holding that consideration of those factors was an abuse of discretion. *Id.* at 713-723. Predictably, the case then settled—for nearly $6.5 million, exclusive of attorneys' fees and costs. See *Bateman* v. *Am. Multi-Cinema, Inc.*, No. 2:07-CV-00171-FMC-AJWX, Docket No. 114 at *1 (C.D. Cal. Oct. 11, 2011).

Plaintiffs' lawyers have brought FACTA class actions against businesses in many sectors,[8] yet the

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[7] Seeking merely $290 million for a technical statutory violation was rather modest of the *Bateman* plaintiffs. In yet another FACTA case, *Lopez* v. *KB Toys Retail, Inc.*, No. CV 07-144-JFW (CWx), 2007 U.S. Dist. LEXIS 82025, at *13 (C.D. Cal. July 17, 2007), the class sought *$2.9 billion* from the now-defunct toy retailer for the similarly egregious error of including the first, rather than the last, four digits of credit card numbers on customers' receipts. In *Kesler* v. *Ikea U.S. Inc.*, No. SACV 07-568 JVS (RNBx), 2008 WL 413268, at *2 (C.D. Cal. Feb. 4, 2008), the court certified a class seeking *$2.4 billion* from the furniture retailer for including customers' credit-card expiration dates on receipts—despite no evidence that *anyone* in the class suffered any actual injury, see *id.* at *4 ("[E]ven assuming that Kesler suffered no 'out of pocket loss, identity theft, or risk thereof,' these circumstances do not make her atypical of the class, where class recovery is not predicated on actual damages.").

[8] See, *e.g.*, *Cicilline* v. *Jewel Food Stores, Inc.*, 542 F. Supp. 2d 831, 834 (N.D. Ill. 2008) (granting class certification in suit against Jewel supermarkets, seeking up to $1 billion in damages); *Troy* v. *Red Lantern Inn, Inc.*, No. 07 C 2418, 2007 WL 4293014, at *5 (N.D. Ill. Dec. 4, 2007) (granting class certifica-

story is much the same in cases involving many other statutes with similar provisions. In one case concerning the Electronic Communications Privacy Act of 1986 (ECPA), 18 U.S.C. §§ 2510 *et seq.*, for example, the named plaintiffs claimed on behalf of themselves and a putative nationwide class of millions that one of the defendant's computer programs was unlawfully intercepting users' electronic communications in violation of the ECPA. See *Specht* v. *Netscape Commc'ns Corp.*, 150 F Supp. 2d 585 (S.D.N.Y. 2001) (describing allegations in the complaint), *aff'd*, 306 F.3d 17 (2d Cir. 2002). Because none of the *Specht* plaintiffs alleged any particular or concrete injury, see *Specht* v. *Netscape Commc'ns Corp.*, Nos. 1:00-CV-4871, *et al.*, 2004 WL 5475796, ¶¶ F, N, Q (S.D.N.Y. Sept. 2, 2004) ("Stipulation of Settlement"), the case rightfully should have been dismissed at the outset for lack of standing, see, *e.g.*, *Kendall* v. *Employees Ret. Plan of Avon Prods.*, 561 F.3d 112, 121 (2d Cir. 2009) (plaintiffs must "allege some injury or deprivation of a specific right" outside the violation of a "statutory duty").

Instead, it tied up the parties and federal courts for years while class counsel sought statutory damages of $10,000 apiece, for each of the named plaintiffs and for each of the many millions of supposedly identically situated putative class members. See *Specht* v. *Netscape Commc'ns Corp.*, Nos. 1:00-CV-4871, *et al.*, 2000 WL 34500293, ¶¶ 13,

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tion in suit against Balducci's, seeking up to $5 million in damages); *Medrano* v. *WCG Holdings, Inc.*, No. SACV 07-0506 JVS (RNBx), 2007 WL 4592113, at *7 (C.D. Cal. Oct. 15, 2007) (granting class certification in suit against a Wendy's franchise, seeking up to $3.2 million in damages).

41-54 (S.D.N.Y. Aug. 3, 2000). The litigation cost Netscape several million dollars in discovery and other defense costs before resulting in a class-wide settlement in which plaintiffs and their counsel obtained no money. See Stipulation of Settlement ¶¶ F, N, Q; see also *Specht* v. *Netscape Commc'ns Corp.*, Nos. 1:00-CV-4871, *et al.*, Docket No. 94, at *3 (S.D.N.Y. Apr. 22, 2005) (denying class counsel's motion for attorneys' fees on grounds that settlement did not secure any "quantifiable" benefits for the class), *aff'd sub nom. Weindorf* v. *Netscape Commc'ns Corp.*, 173 F. App'x 44 (2d Cir. 2006).

The Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. § 1692, has been equally ripe for abuse. The parties in *Jerman* v. *Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573 (2010), for instance, spent years litigating whether the words "in writing" can be included in a debt collector's letter. After this Court remanded the case, the parties filed cross-motions for summary judgment, and the district court held that the plaintiff and the class were entitled to zero actual damages and zero statutory damages. See *Jerman* v. *Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, No. 1:06-cv-1397, 2011 WL 1434679, at *10-*11 (N.D. Ohio Apr. 14, 2011). Undeterred, plaintiff's counsel filed a motion seeking nearly $350,000 in attorneys' fees and costs, arguing that the action was successful because plaintiff "obtained judgment" on a claim. See *Jerman*, No. 1:06-cv-1397-PAG, Docket No. 62-1, at *3-4 (N.D. Ohio May 3, 2011). Defendants finally settled. Notwithstanding the court's prior ruling that the plaintiff class was entitled to nothing, the class received a grand total of $17,000—roughly one-ninth of the class lawyers' take. *Jerman*, No. 1:06-cv-1397-PAG, Docket No. 88-1, at *4 (N.D. Ohio Dec. 13, 2011).

There are countless other, equally egregious examples involving similar statutes. See, *e.g.*, *In re Facebook Privacy Litig.*, 791 F. Supp. 2d 705, 711-712 (N.D. Cal. 2011) (holding that plaintiffs established standing under Article III by alleging a statutory violation despite a lack of injury in fact, but dismissing case on grounds that allegations did not state a claim under the ECPA); *Taylor* v. *Acxiom Corp.*, 612 F.3d 325, 340 n.15 (5th Cir. 2010) (same result under the Driver's Privacy Protection Act (DPPA), 18 U.S.C. §§ 2721-2725, in a suit seeking trillions of dollars in statutory damages). The same pattern emerges time and again: (1) file technical regulatory suit seeking astronomical damages; (2) get the class certified; (3) settle. In *Parker* v. *Time Warner Entm't Co., L.P.*, 631 F. Supp. 2d 242, 248 (E.D.N.Y. 2009), for instance, the millions-strong class sought damages of "at a minimum, hundreds of millions of dollars" for technical violations of the Cable Communications Policy Act, which provides statutory damages of $1,000 per claimant. 47 U.S.C. § 551(f)(2)(A). After class certification, this resulted in a settlement with Time Warner paying "Class Counsel's fees and costs in the total amount of $5 million." 631 F Supp. 2d at 251. And the "injured" class members? They got a check for $5, one free month of cable service, or "two free Movies on Demand." *Id.* at 249 n.6.

Whether it is for a technical violation of the FCRA, the FACTA, the ECPA, or any of dozens of other statutes of their kind, the combination of class actions and no-injury statutory private actions provides an easy roadmap for class counsel to drive up damages claims "to levels entirely disproportionate to the underlying dispute." Lawyers for Civil Justice et al., White Paper, *Reshaping the Rules of Civil Pro-*

cedure for the 21st Century 18 (May 2, 2010), for 2010 Conference on Civil Litigation, Duke Law School (May 10-11, 2010).[9] Layering class certification "on top of per-violation damages" in these statutes ultimately "distort[s], rather than facilitate[s], the [statutory] remedial scheme." Richard N. Nagareda, *Aggregation and Its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and CAFA*, 106 COLUM. L. REV. 1872, 1887 (2006). And it leads to absurd lawsuits with bet-the-company damages amounts. Take, for instance, the FACTA claim a class brought against pizzeria Chuck E. Cheese in *Blanco* v. *CEC Entm't Concepts L.P.*, No. CV 07-0559 GPS (JWJx), 2008 WL 239658, at *2 (C.D. Cal. Jan. 10, 2008). There, the plaintiffs "sought $1.9 billion, even though the company's net income the prior year was only $68 million." Scheuerman, *supra*, at 106; see also *Lopez*, 2007 U.S. Dist. LEXIS 82025, at *14 (plaintiffs sought a minimum statutory damages award of "more than 600% of [d]efendant's net worth"). Piling on one no-injury plaintiff after another serves one very simple goal: "The larger the claim, the greater the leverage plaintiffs' attorneys have to obtain a settlement." Bradley J. Bondi, *Facilitating Economic Recovery and Sustainable Growth through Reform of the Securities Class-Action System: Exploring Arbitration as an Alternative to Litigation*, 33 HARV. J.L. & PUB. POL'Y 607, 617 (2010).

For companies with many customers or mass-market products, suits like these create a risk of crippling damages for conduct that caused no actual

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[9] Available at http://www.dri.org/ContentDirectory/Public/WhitePapersReports/Reshaping%20the%20Rules%20of%20Civil%20Procedure%20for%20the%2021st%20Century%20(2010).pdf (last visited July 7, 2015).

harm.[10] It is no secret that class actions are a "powerful tool [that] can give a class attorney unbounded leverage." S. Rep. No. 109-14, at 20 (2005) (Class Action Fairness Act); *ibid.* (discussing "frivolous lawsuits" that "essentially force corporate defendants to pay ransom to class attorneys by settling"). As this Court has repeatedly recognized, "[c]ertification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense." *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 476 (1978); see also *AT&T Mobility LLC* v. *Concepcion*, 131 S. Ct. 1740, 1752 (2011) ("[W]hen damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable. Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims."); *Shady Grove Orthopedic Assocs., P.A.* v. *Allstate Ins. Co.*, 559 U.S. 393, 445 n.3 (2010) (Ginsburg, J., dissenting) ("When representative plaintiffs seek statutory damages, [the]

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[10] In an effort to curtail such frivolous suits, some district courts have refused to certify classes where "even the minimum statutory damages would be enormous and completely out of proportion given the lack of any actual harm." *Evans* v. *U-Haul Co. of Cal.*, No. CV 07-2097-JFW, 2007 WL 7648595, at *4 (C.D. Cal. Aug. 14, 2007) (denying certification of a class seeking statutory damages of up to $1.5 billion). But those rearguard attempts to fix problems caused by lax enforcement of constitutional standing principles are at best unevenly applied and, worse, increasingly foreclosed as a matter of law. See, *e.g.*, *Murray* v. *GMAC Mortg. Corp.*, 434 F.3d 948, 952-953 (7th Cir. 2006) (foreclosing consideration of the size of statutory damages sought under the FCRA, in a suit seeking up to $1.2 billion in damages).

pressure to settle may be heightened because a class action poses the risk of massive liability unmoored to actual injury.").

Frivolous class actions like these take an enormous toll on U.S. businesses. The cost to defend against a class action can range from "$5 million to $100 million." Adeola Adele, Dukes v. Wal-Mart: *Implications for Employment Practices Liability Insurance* 1 (July 2011).[11] Although the costs are high enough to hit the bottom line of even the largest company, frivolous class actions "particularly hit[] small business because it is the small business that gets caught up in the class action web without the resources to fight." 151 Cong. Rec. 1664 (Feb. 8, 2005) (statement of Sen. Grassley); see also U.S. Chamber Institute for Legal Reform, *Tort Liability Costs for Small Business* 9 (July 2010)[12] (noting that small businesses took in only 22% of total revenue but bore the brunt of 81% of business tort liability costs); NFIB, *National Small Business Survey* vol. 5, issue 2 (2005) (noting that, on average, the cost of settling a legal dispute consumes 10% of a small business owner's salary); Matthew Grimsley, *What*

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11 Available at http://usa.marsh.com/Portals/9/Documents/FINPROFocusDukesvWalMartJuly2011.pdf (last visited July 7, 2015). See also Carlton Fields Jorden Burt, *Class Action Survey: Best Practices in Reducing Cost and Managing Risk in Class Action Litigation* 14 (2015), available at http://classactionsurvey.com/pdf/2015-class-action-survey.pdf ("In 25 percent of bet-the-company class actions, companies spend more than $13 million per year per case on outside counsel. In 75 percent of such actions, the cost of outside counsel exceeds $5 million per year per case.").

12 Available at http://www.instituteforlegalreform.com/uploads/sites/1/ilr_small_business_2010_0.pdf (last visited July 7, 2015).

Effect Will Wal-Mart *v.* Dukes *Have on Small Businesses?*, 8 OHIO ST. ENTREPRENEURIAL BUS. L.J. 99, 116-117 (2013) (discussing how small businesses, with fewer resources, are particularly ill equipped to fight frivolous class actions). And, in addition to the direct costs of time and expense, there is the not-insignificant indirect cost to a business's reputation that comes with being embroiled in a class action. See, *e.g.*, Grimsley, *supra*, at 100-101 & n.7.

It is a well-known fact that class actions can drag on for years. See, *e.g.*, U.S. Chamber Institute for Legal Reform, *Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions* 1, 5 (Dec. 2013)[13] ("Approximately 14% of all class action cases remained pending four years after they were filed, without resolution or even a determination of whether the case could go forward on a class-wide basis."). The prospect of paying several years' worth of attorney fees to maintain a defense works in tandem with the astronomical damages sought in these no-injury statutory damages cases to make class certification, "in effect, the whole case." FTC Workshop, *Protecting Consumer Interests in Class Actions* (Sept. 13-14, 2004), in *Panel 2: Tools for Ensuring that Settlements are "Fair, Reasonable, and Adequate,"* 18 GEO. J. LEGAL ETHICS 1197, 1213 (2005).[14] In the

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[13] Available at http://www.instituteforlegalreform.com/uploads/sites/1/Class_Action_Study.pdf (last visited July 7, 2015).

[14] Moreover, a district court's certification of a class is often conclusive because it is difficult for parties to obtain appellate review of class certification. U.S. Chamber Institute for Legal Reform, *A Roadmap for Reform: Lessons from Eight Years of the Class Action Fairness Act* 14 (Oct. 2013), available at http://www.instituteforlegalreform.com/uploads/sites/1/A_

end, businesses subjected to these kinds of suits can either fight on, bearing the significant costs to do so and also opening themselves up to potentially ruinous liability, or acquiesce to what amounts to a "blackmail settlement[]." Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (1973); cf. Richard A. Epstein, *Class Actions: Aggregation, Amplification, and Distortion*, 2003 U. CHI. LEGAL. F. 475, 496 (2003) ("[A] 10 percent exposure to a ten billion dollar verdict counts as real money, even today.").

Class actions will probably always "present opportunities for abuse." *Hoffmann-La Roche Inc.* v. *Sperling*, 493 U.S. 165, 171 (1989). But the likelihood of abuse is particularly great in cases such as this one, where a plaintiff need not show actual harm. These sorts of baseless class actions can and should be resolved quickly through challenges to standing. The restoration of proper constitutional standing requirements would deter the plaintiffs' bar from filing such meritless suits in the first place and spare defendants the enormous costs and settlement pressures that accompany such litigation. In this "era of frequent litigation [and] class actions * * *, courts must be more careful to insist on the formal rules of standing, not less so." *Ariz. Christian Sch. Tuition Org.* v. *Winn*, 131 S. Ct. 1436, 1449 (2011).

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Roadmap_For_Reform_pages_web.pdf (last visited July 7, 2015); *id.* at 13 ("[B]etween September 30, 2006 and April 24, 2013, federal appellate courts granted fewer than *one fourth* of the [Rule 23(f)] petitions seeking interlocutory review of lower court class certification rulings.").

III. THE FCRA SHOULD BE CONSTRUED TO AVOID CONFLICT WITH ARTICLE III

There is no need to set the FCRA (or many other statutes like it) on a collision course with Article III. As Petitioner ably explains, Pet. Br. 53-56, the Ninth Circuit could have sidestepped the constitutional concerns raised here through statutory construction, with or without employing the "well-established principle that statutes will be interpreted to avoid constitutional difficulties." *Frisby* v. *Schultz*, 487 U.S. 474, 483 (1988); accord *Bond* v. *United States*, 134 S. Ct. 2077, 2088 (2014).

We leave to petitioner the detailed construction of the statute, and focus on the constitutional-avoidance canon. By that principle, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Pub. Citizen*, 491 U.S. at 466. Indeed, when construing a statute, "this Court will first ascertain whether a construction of the statute is fairly possible by which the constitutional question may be avoided." *United States* v. *Sec. Indus. Bank*, 459 U.S. 70, 78 (1982) (internal quotation marks omitted); see also *Arizona* v. *Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247, 2259 (2013) (construing state law in a manner "to avoid serious constitutional doubt"); Adrian Vermeule, *Saving Constructions*, 15 GEO. L.J. 1945, 1960-1961 (1997) (discussing several other instances where the Court has construed statutes to avoid potential constitutional problems).

It is not hard to find an "otherwise acceptable construction" of the FCRA. The statute provides

consumers a statutory remedy of "any actual damages sustained by the consumer as a result of the failure or damages of not less than $100 and not more than $1,000." 15 U.S.C. § 1681n(a)(1)(A). A "fair reading" (*Bond*, 134 S. Ct. at 2088) of the FCRA's damages provision is that it gives a plaintiff the option of seeking statutory damages in place of actual damages in the event, for instance, that his actual damages are worth less than $1,000 or are difficult to prove. As another court of appeals has noted, a "reasonable reading of th[is] statute" is one that would "still require proof of actual damages but simply substitute statutory rather than actual damages for the purpose of calculating the damage award." *Dowell* v. *Wells Fargo Bank, NA*, 517 F.3d 1024, 1026 (8th Cir. 2008) (per curiam); *ibid.* ("It does not necessarily follow from [Section 1681n(a)(1)(A)] that statutory damages are available where a plaintiff fails to prove actual damages.").[15] Nothing in the Act itself suggests the broader, constitutionally problematic reading that the alternative statutory damages provision was meant to displace traditional standing requirements. See Pet. Br. 55.

Congress indicated no desire to test the boundaries of constitutional standing when it provided for statutory damages in the FCRA. Courts should not assume that Congress has exercised the full extent of its power to expand standing when it has not said so. When "choosing between competing plausible inter-

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[15] See also *Wallace* v. *ConAgra Foods, Inc.*, 747 F.3d 1025, 1032 (8th Cir. 2014) (declining to find congressional intent to permit no-injury suits in the Class Action Fairness Act). But see *Hammer* v. *Sam's East, Inc.*, 754 F.3d 492, 499 (8th Cir. 2014) (holding—incorrectly—that a statutory violation of the FCRA constituted injury-in-fact, but not rejecting *Dowell*).

pretations of a statutory text," there is a "reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts." *Clark* v. *Martinez*, 543 U.S. 371, 381 (2005). Especially here, where the constitutional problem is as grave as it is—see pp. 11-12, *supra*; see also Roberts, *supra*, 42 DUKE L.J. at 1226 ("If Congress directs the federal courts to hear a case in which the requirements of Article III are not met, that Act of Congress is unconstitutional.") (discussing *Defenders of Wildlife*, 504 U.S. at 560)—courts can and should construe statutes *not* to supplant Article III.

A construction that avoids conflict with Article III would also refute respondent's contention that "[t]he likely result of a victory for Spokeo would be a shift of class actions from federal courts, which have limited jurisdiction, to state courts of general jurisdiction." Br. in Opp. 17. This Court's construction of the FCRA, as a "question[] of federal law," would be "binding on all state courts under the supremacy clause of the United States Constitution." *Pierce* v. *San Mateo County Sheriff's Dept.*, 232 Cal. App. 4th 995, 1006 (Cal. Ct. App. 2014); accord *Pippen* v. *State*, 854 N.W.2d 1, 10 (Iowa 2014) ("[O]f course, the decisions of the United States Supreme Court constitute binding authority which we must faithfully apply in our interpretation of federal law."); *State Bank of Cherry* v. *CGB Enters., Inc.*, 984 N.E.2d 449, 458 (Ill. 2013) ("United States Supreme Court interpretation of federal law is clearly binding on this court."); *State* v. *Maddox*, 825 N.W.2d 140, 144 (Minn. 2013) ("Supreme Court precedent on matters of federal law * * * is binding on this court."). It is beyond dispute that the "binding application of federal law" is "ultimately subject to control by this Court." *ASARCO Inc.* v. *Kadish*, 490 U.S. 605, 622 (1989).

In any event, respondent's touted distinction between "federal courts * * * [of] limited jurisdiction" and "state courts of general jurisdiction" (Br. in Opp. 17) greatly oversimplifies the matter. Although the "constraints of Article III do not apply to state courts," *ASARCO*, 490 U.S. at 617, States nevertheless look to federal standing requirements to interpret their own standing rules, particularly with regard to the element that a plaintiff must show "injury in fact." Indeed, many state courts have expressly incorporated federal standing requirements into their own law. See, *e.g.*, *Wasden* v. *State Bd. of Land Comm'rs*, 280 P.3d 693, 697 (Idaho 2012) ("This Court has articulated a standing doctrine analogous to the federal rule."); *Ex parte McKinney*, 87 So. 3d 502, 513 (Ala. 2011) ("our concepts of justiciability are not substantially dissimilar" to the "case-or-controversy requirement of Article III of the United States Constitution"); *Dover Historical Soc'y* v. *City of Dover Planning Comm'n*, 838 A.2d 1103, 1111 (Del. 2003) ("[T]he *Lujan* requirements for establishing standing under Article III to bring an action in federal court are generally the same as the standards for determining standing to bring a case or controversy within the courts of Delaware."); *Town of Parker* v. *Milton*, 726 A.2d 477, 480 (Vt. 1998) ("The judicial power, as conferred by the Constitution of this State upon this Court, is the same as that given to the Federal Supreme Court by the United States Constitution."); *Toxic Waste Impact Grp., Inc.* v. *Leavitt*, 890 P.2d 906, 910-911 (Okla. 1994) (noting that Oklahoma's standing "jurisprudence is similar" to federal law).

Still other States look to federal standing case law as a guide to their own standing requirements. See, *e.g.*, *Godfrey* v. *State*, 752 N.W.2d 413, 418 (Iowa

2008) ("[O]ur doctrine on standing parallels the federal doctrine, even though standing under federal law is fundamentally derived from constitutional strictures not directly found in the Iowa Constitution.") (discussing injury-in-fact element); *Feminist Women's Health Ctr.* v. *Burgess*, 651 S.E.2d 36, 38 (Ga. 2007) ("[W]e frequently have looked to United States Supreme Court precedent concerning Article III standing to resolve issues of standing to bring a claim in Georgia's courts."); *Sea Pines Ass'n for the Protection of Wildlife, Inc.* v. *S.C. Dep't of Natural Res.*, 550 S.E.2d 287, 291-292 (S.C. 2001) (noting that standing "requires the plaintiff to suffer an injury in fact, or a particularized harm," and looking to *Defenders of Wildlife* and other federal case law to assess the "actual or imminent" nature of that injury); *Cincinnati City Sch. Dist.* v. *State Bd. of Educ.*, 680 N.E.2d 1061, 1066 (Ohio 1996) ("[I]n deciding issues of standing in the courts of Ohio, the Ohio Supreme Court relies on federal court decisions."); *Carter* v. *Mont. Dep't of Transp.*, 905 P.2d 1102, 1105 (Mont. 1995) (Nelson, J., concurring) ("This Court has interpreted [standing in state courts] to embody the same limitations as the Article III 'case or controversy' provision in the United States Constitution.").

And state courts routinely assess whether plaintiffs have alleged the requisite injury-in-fact to have standing to bring suit. See, *e.g.*, *Save the Pine Bush, Inc.* v. *Common Council of the City of Albany*, 918 N.E.2d 917, 924 (N.Y. 2009) (Pigott, J., concurring) ("In order to have standing, a party must demonstrate an 'injury in fact'—an actual legal stake in the matter being adjudicated."); *Glisson* v. *City of Marion*, 720 N.E.2d 1034, 1039 (Ill. 1999) (recognizing the "general principle that standing requires some injury

in fact to a legally cognizable interest"); *Coleman* v. *Sopher*, 459 S.E.2d 367, 372 n.6 (W. Va. 1995) ("[P]laintiffs * * * must have suffered an 'injury-in-fact'—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent and not conjectural or hypothetical.") (looking to *Defenders of Wildlife*); *Tex. Ass'n of Bus.* v. *Tex. Air Control Bd.*, 852 S.W.2d 440, 444 (Tex. 1993) ("Under the Texas Constitution, standing is implicit in the open courts provision, which contemplates access to the courts only for those litigants suffering an injury."); Gavin L. Charlston, *When Silence Means Everything: The Application of Proposition 64 to Pending Actions*, 58 HASTINGS L.J. 623, 623 (2007) (discussing Proposition 64, through which California voters amended the State's Unfair Competition Law, under which "far more time and money [had been] spent on actions brought by plaintiffs who had suffered no cognizable injury" than on legitimate claims, to require litigants to "prove that they have suffered an injury-in-fact").

Indeed, even those States that have been most reluctant to adopt the full import of federal standing requirements part ways only in circumstances that require addressing matters of exceptional public importance. See, *e.g.*, *ACLU* v. *Albuquerque*, 188 P.3d 1222, 1226-1227 (N.M. 2008) (noting that state courts apply traditional standing requirements, with an exception turning on the "public importance of the issues involved"); *Sierra Club* v. *Dep't of Transp.*, 167 P.3d 292, 312 (Haw. 2007) (noting that state courts generally follow federal standing requirements, with limited exceptions to serve "the needs of justice"); *Utah Chapter of Sierra Club* v. *Utah Air Quality Bd.*, 148 P.3d 960, 967, 972 (Utah 2006) (noting that state courts generally apply the "traditional" federal

standing test, with limited exceptions for "issues of significant public importance"); *Fernandez* v. *Takata Seat Belts, Inc.*, 108 P.3d 917, 921 (Ariz. 2005) ("[A]lthough, as a matter of discretion, we can waive the requirement of standing, we do so only in exceptional circumstances generally in cases involving issues of great public importance that are likely to recur."). It would strain credulity to think that the sort of technical statutory violation here—where the named plaintiff cannot so much as muster even a minimal showing of actual harm—would rise to the level of exceptional public importance.

CONCLUSION

The judgment of the Ninth Circuit should be reversed.

Respectfully submitted.

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REPLY BRIEF

No. 13-1339

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Supreme Court of the United States

SPOKEO, INC.,

Petitioner,

v.

THOMAS ROBINS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE COALITION FOR SENSIBLE PUBLIC RECORDS ACCESS; AMERICAN ESCROW ASSOCIATION; AMERICAN LAND TITLE ASSOCIATION; CONSUMER MORTGAGE COALITION; NATIONAL ASSOCIATION OF REALTORS®; AND REAL ESTATE SERVICES PROVIDERS COUNCIL, INC. (RESPRO®) AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

STATEMENT OF INTEREST 1

SUMMARY OF ARGUMENT 4

ARGUMENT 6

I. ADOPTION OF THE NINTH CIRCUIT'S INJURY-IN-LAW APPROACH FOR STANDING WILL LEAD TO SETTLEMENT OF MERITLESS CLAIMS, BECAUSE THAT APPROACH EXPOSES INDIVIDUALS AND BUSINESSES TO THE THREAT OF OVERWHELMING LIABILITY, EVEN WHEN THERE IS NO ACTUAL HARM TO PLAINTIFFS 6

A. Members Of Amici Are Subject To Significant Litigation Risk Based On Their Dealings With Public Records, Even When There Is No Injury To A Plaintiff, And No Merit To The Claims. 9

B. No-Injury Lawsuits Under RESPA, With Treble Damages, Are Commonplace, Even When The Consumer Was Satisfied And Was Provided With Good Service And Pricing. 16

II. ENFORCEMENT OF THE LAW AND DETERRENCE ARE STILL ACHIEVED IF PRIVATE DAMAGE RECOVERIES ARE RESTRICTED TO

TABLE OF CONTENTS—continued

Page

SITUATIONS WHERE INJURY IS ACTUALLY ALLEGED AND CAN BE PROVEN 25

A. Congress Provided Multiple Avenues For Enforcement Of The Consumer Protection Statutes 25

B. The States, With Their Attorneys General, Have Extensive Authority To Enforce FCRA, RESPA And Similar Statutes To Provide Superior Relief For Consumers. 31

CONCLUSION 33

TABLE OF AUTHORITIES

Cases	Page(s)
AT&T Mobility LLC v. *Concepcion*, 131 S. Ct. (2011)	7
Benway v. *Res. Real Estate Servs., LLC*, 239 F.R.D. 419 (D. Md. 2006)	19
Brittingham v. *Prosperity Mortg. Co.*, No. 1:09-cv-00826-WMN (D. Md. Aug. 24, 2010)	19
Busby v. *JRHBW Realty Inc.*, No. 2:04-CV-2799-VEH, 2012 U.S. Dist. LEXIS 145037 (N.D. Ala 2012)	21
Cahlin v. *General Motors Acceptance Corporation*, 936 F.2d 1151 (11th Cir. 991)	13
Charvat v. *Mut. First Fed. Credit Union*, 725 F.3d 819 (8th Cir. 2013)	24
Cooper v. *BB Syndication Servs.* (*In re 222 S. Caldwell St., Ltd. P'ship*), 409 B.R. 770 (Bankr. W.D.N.C. 2009)	10
Coopers & Lybrand v. *Livesay*, 437 U.S. 463 (1978)	7
Dun & Bradstreet, Inc. v. *Greenmoss Builders, Inc.*, 472 U.S. 749 (1985)	15
Edwards v. *First American Corp.*, 610 F.3d 514 (9th Cir. 2010), *cert. granted*, 131 S. Ct. 3022 (U.S. 2011), *cert. dismissed as improvidently granted*, 132 S. Ct. 2536 (2012)	3, 17

TABLE OF AUTHORITIES—continued

Evans v. *Credit Bureau*,
904 F. Supp. 123 (W.D.N.Y. 1995) 12

Frost v. *Experian*,
1998 U.S. Dist. LEXIS 17276, 1998
WL 765178 (S.D.N.Y. Oct. 30, 1998) 14

Gambardella v. *G. Fox & Co.*,
716 F.2d 104 (2d Cir. 1983) 24

Graczyk v. *West Publ'g Corp.*,
660 F.3d 275 (7th Cir. 2011) 16

Graczyk v. *West Publ'g Corp.*,
No. 09-C-4760, 2009 WL 5210846,
2009 U.S. Dist. Lexis 120256 (N.D.
Ill. Dec. 23, 2009) 16

Gray v. *Fountainhead Title Grp. Corp.*,
No. 1:03-cv-01675-WMN (D. Md.
Aug. 30, 2004) 20

Henderson v. *Infomart, Inc.*,
No. 1:14-cv-01609, Dkt. 59 at 16
(N.D. Ga. Aug. 8, 2014) 11

Henson v. *CSC Credit Servs.*,
29 F.3d 280 (7th Cir. 1994) 14

Koropolous v. *Credit Bureau, Inc.*,
236 U.S. App. D.C. 136, 734 F.2d 37
(D.C. Cir. 1984) 13

Lane v. *Residential Funding Corp.*,
323 F.3d 739 (9th Cir. 2003) 17

Lawsky v. *Condor Capital Corp.*,
No. 1:14-cv-02863-CM (S.D.N.Y 2014) 32

TABLE OF AUTHORITIES—continued

McManus v. *Fountainhead Title Grp. Corp.*,
No. 1:03-cv-02813-WMN (D. Md. Jan. 18, 2006) 20

Minnesota v. *U.S. Bank N.A.*,
No. 0:99-cv-872 (D. Minn. 1999) 32

Minter v. *Wells Fargo Bank, N.A.*,
No. WMN-07-3442, 2013 U.S. Dist. LEXIS 122344 (D. Md. Aug. 28, 2013) 19, 20, 21, 22, 23

Minter v. Wells Fargo Bank, N.A.,
762 F.3d 339, 350 (D. Md. 2014) 23

Nike, Inc. v. *Kasky*,
539 U.S. 654 (2003) 7

O'Brien v. *Equifax Info Servs.*,
382 F. Supp. 2d 733 (E.D. Pa. 2005) 14

Papasan v. *Allain*,
478 U.S. 265 (1986) 10

In the Matter of PHH Corporation,
No. 2014-CFPB-0002 (Nov. 25, 2014) 29

PHH Corporation, et al. v. *CFPB*,
No. 15-1177 (D.C. Cir. June 19, 2015) 29

Purtle v. *Eldridge Auto Sales, Inc.*,
91 F.3d 797 (6th Cir. 1996) 24

In re Rhone-Poulenc Rorer, Inc.,
51 F.3d 1293 (7th Cir. 1995) 8

Robinson v. *Fountainhead Title Group Corp.*,
252 F.R.D. 275 (D. Md. 2008) 19

TABLE OF AUTHORITIES—continued

Sarver v. *Experian Info. Solutions*,
390 F.3d 969 (7th Cir. 2004) 14

Schuman v. *Roger Baker & Assocs.*,
70 N.C. App. 313, 319 S.E.2d 308
(N.C. Ct. App. 1984) 10

Sec'y of State for Defence v. *Trimble Navigation Ltd.*,
484 F.3d. 700 (4th Cir. 2007) 10

Shady Grove Orthopedic Assocs., P.A. v. *Allstate Ins. Co.*,
559 U.S. 393 (2010) 7

Sorrell v. *IMS Health*,
131 S. Ct. 2653 (2011) 15

State of Maryland et al. v. *Wells Fargo Bank, N.A.*,
No. 1:15-cv-00179-RDB (D. Md. 2015)..... 31

State of Mississippi v. *Experian Info. Solutions, Inc.*,
No. 1:14-cv-243LG-JMR (S.D. Miss. 2014)..... 32

Stillmock v. *Weis Mkts., Inc.*,
385 Fed. Appx. 267 (4th Cir. 2010)..... 23

Taylor v. *Acxiom Corp.*,
612 F.3d 325 (5th Cir. 2010) 16

Trans Union LLC v. *Fed. Trade Comm'n*,
536 U.S. 915 (2002) 7

Traylor v. *United Cash Sys., LLC*,
No. 3:12-cv-01006 (MPS), 2014 U.S. Dist. LEXIS 179496 (D. Conn. Nov. 10, 2014)..... 24

TABLE OF AUTHORITIES—continued

U.D. Registry, Inc. v. *State of California*,
2006 Cal. App. LEXIS 1693 (Cal. App. 2d Dist., Oct. 30, 2006) 15

United States v. *Spokeo*,
No. 2:12-cv-05001-MMM-SH, Dkt. 4 (C.D. Cal. June 19, 2012) 31

United States v. *Telecheck Servs., Inc.*,
No. 1:14-cv-00062 (D.D.C. Jan. 16, 2014) 30

Wal-Mart Stores, Inc. v. *Dukes*,
131 S. Ct. 2541 (2011) 8

West Virginia v. *CVS Pharm., Inc.*,
646 F.3d 169 (4th Cir. 2011) 32, 33

Williams v. *Colonial Bank*,
826 F. Supp. 415 (M.D. Ala. 1993), *aff'd* 29 F.3d 641 (11th Cir. 1994) 12

Yates v. *All Am. Abstract Co., Inc.*,
No. 2:06-cv-02174-HB (E.D. Pa. July 8, 2008) 20

Yourke v. *Experian Information Solutions*,
No. C 06-2370, 2007 WL 1795705, 2007 U.S. Dist. LEXIS 47558 (N.D. Cal. June 20, 2007) 12

Statutes

12 U.S.C. § 1818(b)(1) 26

12 U.S.C. § 1818(i)(2) 26

Real Estate Settlement Procedures Act
12 U.S.C. § 2601 et seq. ..... *passim*

TABLE OF AUTHORITIES—continued

12 U.S.C. § 2607(a) 18
12 U.S.C. § 2607(d)(1) 26
12 U.S.C. § 2607(d)(2) 17
12 U.S.C. § 2607(d)(4) 31
12 U.S.C. § 5491(a) 27
12 U.S.C. § 5497(d) 28
12 U.S.C. § 5552 31
12 U.S.C. § 5562 27
12 U.S.C. § 5565 ..... 27, 28
12 U.S.C. § 5565(c)(2) 28
12 U.S.C. § 5581 26
12 U.S.C. § 5582 26
Truth in Lending Act
15 U.S.C. § 1601, et seq. 24, 31
Fair Credit Reporting Act
15 U.S.C. § 1681, et seq. ..... *passim*
15 U.S.C. § 1681(a)(1) 26
15 U.S.C. § 1681(b)(1) 26
15 U.S.C. § 1681e 12
15 U.S.C. § 1681e(b) 11
15 USC § 1681k(a) 11
15 U.S.C. § 1681n(a)(2) 12
15 U.S.C. § 1681o(a) 11
15 U.S.C. § 1681s(b)(1)(A)-(G) 26
15 U.S.C. § 1681s(c)(1) 31
15 U.S.C. § 1693m(a)(2) 24
Driver Privacy Protection Act
18 U.S.C. § 2721, et seq. ..... *passim*

TABLE OF AUTHORITIES—continued

18 U.S.C. § 2722(a) 15
18 U.S.C. § 2724(a) 15
18 U.S.C. § 2724(b)(1) 15
Telephone Consumer Protection Act
47 U.S.C. § 227(3) 24

Rules and Regulations

12 C.F.R. § 1022.42, App. E (2011) 14
16 C.F.R. pt. 600, App (2007). 13, 14
61 Fed. Reg. 29,258 (June 7, 1996) 20
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Fed. R. Civ. P. 23 8

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Public Records – Are there any errors? New York Department of State, Division of Consumer Protection *Unraveling the Mystery Behind Credit Reports,* http://www.dos.ny.gov/consumerprotection/identity_theft/protect_yourself_from_identity_theft/unravel.html 10

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STATEMENT OF INTEREST[1]

The members of amici are subject to numerous federal statutes including, among others, the Fair Credit Reporting Act ("FCRA") and the Real Estate Settlement Procedures Act ("RESPA"). Many of these statutes provide a private right of action to pursue alleged violations, and recovery of significant statutory damages. Plaintiffs frequently pursue claims under these types of statutes on behalf of putative classes, exposing defendants to the threat of overwhelming liability—even if no plaintiff was harmed by the conduct (and some may even have benefitted) and even if the claim is wholly without merit. Litigating in the face of such exposure in these circumstances presents an overwhelming risk that defendants should not, and are not required to, take.

Amici's members are all too familiar with this issue, and have frequently been confronted with the prospect of a class action lawsuit brought against them by a consumer who suffered no injury, including some who were solicited to represent the proposed class. As a result, amici's members—some of whom supply lending, insurance or transactional information, or facilitate residential real estate purchases—face increased costs of doing business and are significantly less willing to bear risk and to

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[1] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than amici, their members, or their counsel made a monetary contribution to this brief's preparation or submission. The parties have consented to the filing of this brief.

innovate, to the ultimate detriment of all consumers and the economy.

The Coalition for Sensible Public Records Access ("CSPRA"), a nonprofit organization, promotes open public records access to ensure consumers and businesses have the ability to collect and use the information available in government records. CSPRA's members include credit reporting agencies and other public record information providers and users, including those serving industries for mortgage lending, auto, insurance, and law enforcement. The business of collecting and utilizing public records provides critical infrastructure of our data-driven economy, from supporting marketing campaign decisions, identifying and verifying consumer and businesses qualifications, facilitating rapid and accurate credit decisions, to expanding the range, convenience and confidence of payment mechanisms and consumer transactions.

The American Escrow Association ("AEA"), formed in 1980, is a national association of real estate settlement agents. Representing a large number of "mom and pop" operations in the mortgage closing business, AEA has approximately 3,000 members. AEA seeks to further the knowledge and professionalism of its members and to educate and advise policy-makers at the national level on issues of consequence to the settlement industry as a whole.

The American Land Title Association ("ALTA"), founded in 1907, is a national trade association and voice of the real estate settlement services, abstract and title insurance industry. ALTA represents over 5,600 member companies. ALTA members operate in every county in the United States to search, review

and insure land titles to protect home buyers and mortgage lenders who invest in real estate. ALTA members include title insurance companies, title agents, independent abstracters, title searchers and attorneys, ranging from small, one-county operations to large national title insurers.

The Consumer Mortgage Coalition ("CMC") is a trade association of national mortgage lenders, mortgage servicers and mortgage origination-service providers, committed to the nationwide rationalization of consumer mortgage laws and regulations. The CMC appears as *amicus curiae* in litigation with implications for the national mortgage-lending marketplace.

The National Association of Realtors ("NAR") represents all phases of the real estate business, including, but not limited to, brokerage, appraising, management and counseling. Its membership includes 54 state and territorial associations of REALTORS®, approximately 1,400 local associations of REALTORS®, and more than 1 million REALTOR® and ASSOCIATE® members. NAR represents the interests of these real estate professionals in important matters before the legislatures, courts and executives of the federal and state governments. NAR has previously participated as *amicus curiae* in numerous cases before this court including *Edwards* v. *First Am. Fin. Corp.*, 610 F.3d 514 (9th Cir. 2010), *cert. granted*, 131 S. Ct. 3022 (U.S. 2011); *cert. dismissed*, 132 S. Ct. 2536 (U.S. 2012) (hereafter, "*Edwards*").

The Real Estate Service Providers Council ("RESPRO®") is a non-profit trade association comprised of approximately 175 members from all

segments of the residential home buying and financing industry whose common bond is to offer so-called "one-stop shopping programs" for homebuyers through so-called "affiliated business arrangements" under RESPA. RESPRO®'s members consist of real estate brokerage firms, title agencies, escrow companies, home warranty companies, and mortgage providers. RESPRO® authored an *amicus* brief in the *Edwards* case before this Court.

SUMMARY OF ARGUMENT

The Ninth Circuit's decision, and others like it, poses a major threat to the Constitution's apportioned role for the federal courts. This Court has been clear that, although Congress has the power to create new legal rights and causes of action where none previously existed, Article III requires a plaintiff to have suffered injury-in-fact before he can avail himself of the federal courts. Congress's enactment of statutes containing damages provisions cannot change the fundamental separation of the legislative and judicial functions, and the Ninth Circuit's decision to the contrary cannot be reconciled with this Court's longstanding Article III jurisprudence.

Amici agree with Petitioner that the Constitution does not provide a judicial remedy to an uninjured plaintiff due to the mere violation of a statute providing statutory rights or penalties. Amici write for two purposes. First, amici write to provide examples of the unique and severe exposure their members have faced, and will face if the Court affirms, for alleged violations under the statutes they must contend with as part of their routine business operations. This includes a discussion of potential

exposure under the Fair Credit Reporting Act ("FCRA") and other statutes due to government public records whose content they do not control. It also includes a discussion of similar liability exposure faced under RESPA and other similar laws. Second, amici write to highlight other robust enforcement mechanisms, apart from private litigation, that currently exist to address conduct that these statutes were enacted to prevent or regulate, including dramatically increased federal enforcement and remedial powers as well as state-pursued remedies.

The Ninth Circuit's decision has significant real-world consequences. The proliferation of class action lawsuits places many businesses and individuals, including amici's members, at risk of being sued for annihilative damages even when the plaintiff does not allege, and does not intend to prove, any actual injury as a result of the claimed violation. Some of amici's members have been subject to multiple such lawsuits under RESPA. But RESPA, FCRA, and other similar laws do not and should not exist to sponsor opportunistic strike-suits by plaintiffs who allege widespread technical violations of law that caused them no financial or other actual harm. Allowing such lawsuits to proceed licenses plaintiffs, and the class action plaintiffs' attorneys who typically heavily recruit them, to use the class action device and the federal courts to "enforce" claimed widespread conduct that caused no actual harm, which is precisely what Article III standing requirements are intended to prevent.

This is not to say that such claimed statutory violations would go unchecked. Congress can and does provide for regulatory and even criminal enforcement for no-harm conduct that offends the

statute, such as conduct that Congress prohibited based on the belief that it ultimately could have a deleterious effect on the marketplace. Indeed, when Congress created the Consumer Financial Protection Bureau ("CFPB") as part of the Dodd Frank Wall Street Reform and Consumer Protection Act ("Dodd Frank"), it gave the CFPB greatly expanded powers to enforce FCRA, RESPA, and other federal consumer financial laws and an enormous budget with which to do so. Further, state enforcement and private litigation for which there is Article III jurisdiction will remain intact. These enforcement opportunities provide a substantial mechanism for policing compliance with the law without creating the extortionate effects of no-injury class actions.

ARGUMENT

I. ADOPTION OF THE NINTH CIRCUIT'S INJURY-IN-LAW APPROACH FOR STANDING WILL LEAD TO SETTLEMENT OF MERITLESS CLAIMS, BECAUSE THAT APPROACH EXPOSES INDIVIDUALS AND BUSINESSES TO THE THREAT OF OVERWHELMING LIABILITY, EVEN WHEN THERE IS NO ACTUAL HARM TO PLAINTIFFS.

Amici seek to describe and illustrate the serious problems that result from permitting no-injury lawsuits to proceed with the threat of statutory damages, particularly in class actions. This Part includes an analysis of potential exposure for members of amici who deal with public records, whether under FCRA or other statutes. It then discusses examples, most notably under RESPA, of

the types of claims that other members of amici must face in dealing with similar no-injury claims.

The discussions in Parts I.A. and I.B., are real world examples of what members of this Court, and other courts, have repeatedly recognized—that an unchecked class action device can pose an unacceptable threat to potential defendants. *See, e.g.*, *AT&T Mobility LLC* v. *Concepcion*, 131 S. Ct. at 1740, 1752 (2011) ("[W]hen damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable."); *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 476 (1978) ("Certification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense."); *see also, e.g., Shady Grove Orthopedic Assocs., P.A.* v. *Allstate Ins. Co.*, 559 U.S. 393, 445 n.3 (2010) (Ginsburg, J., dissenting) ("When representative plaintiffs seek statutory damages, pressure to settle may be heightened because a class action poses the risk of massive liability unmoored to actual injury." (internal citation omitted)); *Nike, Inc.* v. *Kasky*, 539 U.S. 654, 678-80 (2003) (Breyer, J., dissenting from dismissal of certiorari) (warning of private plaintiffs bringing suit "even though they themselves have suffered no harm"); *Trans Union LLC* v. *Fed. Trade Comm'n*, 536 U.S. 915, 916-17 (2002) (Kennedy, J., dissenting, from denial of certiorari) (noting that potential billion dollar exposure in FCRA class action posed risk to nation's economy and raised First Amendment concerns).

In the words of Judge Henry Friendly, the class action device alone can at times result in "blackmail

settlements," where even defendants with meritorious defenses feel compelled to settle based on the enormous threat of liability that a class action can present. *See In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) (quoting Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (1973)). Expanding the ability to pursue class claims in federal court by altering the traditional injury-in-fact requirement for plaintiffs will simply make this practice more prevalent and class actions more abusive.

Amici are not suggesting that claims under these statutes are never actionable or that class actions may not be properly employed to redress real injuries. To have Article III standing, however, the class plaintiffs must allege certain types of injuries, and in this case (and in many other cases) they do not. Moreover, where the claim is brought as a class action for damages, the claim must be provable with common evidence and facts that predominate. *See* Fed. R. Civ. P. 23; *see also, e.g.*, *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541, 2551 (2011) ("That common contention, moreover, must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke."). Often, however, cases involving consumer class actions are specifically pled in order to make it more likely that a class could be certified, by claiming that all putative class members were injured in the same way. That is particularly simple to do in a no-injury class when the allegation is that the defendant "harmed" everyone in the same way simply by alleging a violation of a statute, even

though there is no evidence of actual harm to any plaintiff.

But Article III does not permit a plaintiff, even one trying to certify a class action, to avoid pleading an actual injury-in-fact. While class actions have a proper and important role to play in our judicial process, permitting them (or any litigation in federal court) to proceed without the important limitations of Article III's standing requirements is not what Congress or the framers of our Constitution envisioned. The examples below demonstrate the problems associated with abandoning this requirement.

A. Members Of Amici Are Subject To Significant Litigation Risk Based On Their Dealings With Public Records, Even When There Is No Injury To A Plaintiff, And No Merit To The Claims.

As noted above, many members of the amici are public record information providers and users. They acquire, utilize and distribute public records for beneficial purposes such as assessing credit in lending, risk in insurance, product history in purchases or background in law enforcement. These public records describe and define legal relationships, status and rights.[2] Government records, however, are not completely free of error,[3] and yet courts and

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[2] "Public records are those records which a government unit is required by law to keep or which it is necessary to keep in discharge of duties imposed by law." *Black's Law Dictionary* (6th ed. 1990).

[3] For example, the Government Accountability Office has cited "governmental agencies that provide information on bankruptcies, liens, collections and other actions noted in public

others consider public records a reliable source of information. *See Sec'y of State for Defence* v. *Trimble Navigation Ltd.*, 484 F.3d. 700, 705 (4th Cir. 2007) ("we may properly take judicial notice of matters of public record") (citing *Papasan* v. *Allain*, 478 U.S. 265, 268 n.1 (1986)). That is one significant reason why they are heavily relied on to facilitate commerce, including credit decisions, purchases, or other decisions requiring certain background checks. *See, e.g., Cooper* v. *BB Syndication Servs.* (*In re 222 S. Caldwell St., Ltd. P'ship*), 409 B.R. 770, 793 (Bankr. W.D.N.C. 2009) ("The Recording Acts are intended to allow potential purchasers and creditors to rely completely on the public record to safely determine the title being obtained.")(citing *e.g., Schuman* v. *Roger Baker & Assocs.*, 70 N.C. App. 313, 326-17, 319 S.E.2d 308, 311 (N.C. Ct. App. 1984)).

Public records—as distributed through aggregators, furnishers, credit reporting agencies ("CRAs"), resellers and other providers—are an essential ingredient in our information economy. They are utilized for decisions relating to proving and protecting consumer identities, employment,

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records as major sources of errors." U.S. Gen. Accounting Office, GAO-03-1036T, Statement for the Record Before the Committee on Banking, Housing and Urban Affairs, U.S. Senate, Consumer Credit, Limited Information Exists on Extent of Credit Report Errors and Their Implications for Consumers, p.ii (July 31, 2003), *available at* http://www.gao.gov/new.items/d031036t.pdf. Also New York's Division of Consumer Protection website advises consumers to check for credit report accuracy poses the introspective query: "Public Records – Are there any errors?" New York Department of State, Division of Consumer Protection *Unraveling the Mystery Behind Credit Reports*, http://www.dos.ny.gov/consumerprotection/identity_theft/protect_yourself_from_identity_theft/unravel.html.

insurance, consumer credit, lending, and retail purchases. Yet fear of litigation may have a chilling effect on such distribution of public record information for economic decision-making, leading to more time-consuming transactions for consumers or increased costs due to unknown risks.

The widespread importance of this type of information is well-recognized, but its use and reporting comes with limitations. FCRA regulates the use and reporting of certain personal information, including information contained in public records, and requires that certain "consumer reporting agencies" "follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the [consumer] report relates." 15 U.S.C. § 1681e(b).[4] A negligent violation of FCRA exposes a defendant to "actual damages," attorney fees, and costs. 15 U.S.C. § 1681o(a). A "willful" violation permits a consumer to seek "actual damages" and statutory "damages of

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[4] For employment purposes, when a CRA utilizes adverse public record information for a report, FCRA requires the CRA to "notify the consumer of the fact that public record information is being reported," or "maintain strict procedures to ensure it "is complete and up to date." 15 USC § 1681k(a). Further, FCRA provides, only "[f]or purposes of this paragraph," that certain public record items are to be considered up to date "if the current public record status of the item at the time of the report is reported." 15 USC § 1681k(a). Yet, as one court has held, nothing in section 1681k relieves an entity of its section 1681e(b) obligation for "maximum possible accuracy." *See Henderson* v. *Infomart, Inc.*, No. 1:14-cv-01609, Dkt. 59 at 16 (N.D. Ga. Aug. 8, 2014)(report and recommendation of magistrate); Dkt. No. 61 (N.D. Ga. Sept. 2, 2014) (order adopting report and recommendation).

not less than $100 and not more than $1,000," and punitive damages. 15 U.S.C. §§ 1681n(a)(2).

As government records are held to be reliable, the accuracy requirements of 1681e, and similar provisions of FCRA, as applied to reporting public records should be measured by fidelity to the underlying record, not subjective opinions concerning the inaccuracy of the factual information. Strictly speaking, a "more accurate" version of the current public record is a misnomer.

A faithful reporting of a public record, however, is not enough to avoid a class action lawsuit under FCRA.[5] The fact that some courts let such claims proceed is reflected in *Yourke* v. *Experian Information Solutions*, No. C 06-2370, 2007 WL 1795705, 2007 U.S. Dist. LEXIS 47558 (N.D. Cal. June 20, 2007). Based on public records, Experian indicated that plaintiff had certain tax liens. *Id.* at 2. Upon plaintiff's dispute, Experian reinvestigated and updated its report to show that all of plaintiff's liens were released, yet plaintiff further complained that the information was still inaccurate, because the plaintiff argued that the liens should be expunged

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[5] Indeed, "FCRA does not require credit reporting agencies to alter inaccuracies in the public record." *Evans* v. *Credit Bureau*, 904 F. Supp. 123, 126 (W.D.N.Y. 1995). Otherwise, an entity may violate its obligations where "[FCRA] imposes the obligation to correctly report that which appears on the public records..." *Id.* at 3, citing *Williams* v. *Colonial Bank*, 826 F. Supp. 415 (M.D. Ala. 1993), *aff'd* 29 F.3d 641 (11th Cir. 1994). Instead, a "consumer's recourse for an inaccurate record is to contact the... clerk's office to correct misinformation... [T]hat responsibility is not shifted to the credit reporting agency." *Id.* at 3-4. Plaintiffs continue, however, to pursue the types of cases discussed in the body of the brief, generating potential exposure to defendants.

from the report altogether. *Id.* at 3. Upon receiving Experian's written response stating that the tax liens were in the public records and therefore were properly reflected on the plaintiff's report, plaintiff sued. *Id.* at 4.

The court denied Experian's motion for summary judgment on claims of willful and negligent conduct under 1681e (requiring maximum possible accuracy). In doing so, the court also allowed the plaintiff to proceed with his willful and negligent 1681i claims (requiring a reasonable investigation of any disputes), because Experian continued to report the information. *Id.* at 9, 11 (relying on *Cahlin* v. *General Motors Acceptance Corporation,* 936 F.2d 1151, 1159 (11th Cir. 991) (citing *Koropolous* v. *Credit Bureau, Inc.*, 236 U.S. App. D.C. 136, 734 F.2d 37 (D.C. Cir. 1984))). In other words, the court held that Experian could not simply rely on the fact that the information it was reporting accurately reflected what was in the public record.[6]

The court's decision in *Yourke* was in contrast to the Federal Trade Commission's ("FTC") guidance from the same year that made clear that obtaining information from a reputable source, with no further evaluation of reasonable procedures, satisfies FCRA's standard of accuracy for information faithfully reproduced. 16 C.F.R. pt. 600, App., Commentary on

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[6] The court allowed a claim for punitive damages for willful conduct causing emotional distress to proceed because the defendant argued its conduct did not violate FCRA *at all.* The court noted that Yourke attributed his anxiety to the feeling he was being ignored by Experian after all his efforts. *Id.* at 12. Of course, under the Ninth Circuit's view, to pursue statutory damages under FCRA the plaintiff need not allege any personal injury or harm.

Fair Credit Reporting Act (2007).[7] However, the FTC rescinded that guidance.[8]

Unable to rely on FTC guidance in this area, defendants face potential liability for reporting public information as the government entity published it, because the courts apply FCRA differently. For example, defendants in some circuits may be able to assert reliance on public records as a defense at the motion to dismiss stage. *See, e.g., Sarver* v. *Experian Info. Solutions*, 390 F.3d 969, 972 (7th Cir. 2004); *Henson* v. *CSC Credit Servs.*, 29 F.3d 280, 286-87 (7th Cir. 1994) (involving a CRA's reported judgment information obtained from a state court judgment docket); *Frost* v. *Experian*, 1998 U.S. Dist. LEXIS 17276, 1998 WL 765178 (S.D.N.Y. Oct. 30, 1998) (addressing Experian reported information obtained from a court docket). That view, however, is not universally held. *See, e.g, O'Brien* v. *Equifax Info Servs.*, 382 F. Supp. 2d 733, 739 (E.D. Pa. 2005) ("There is no reason to believe that the Third Circuit would adopt the Seventh Circuit's holding in *Sarver*,

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[7] Commentary Section 607(3):

> A. *General.* The section does not require error free consumer reports. If a consumer reporting agency accurately transcribes, stores and communicates consumer information received from a source that it reasonably believes to be reputable, and which is credible on its face, the agency does not violate this section simply by reporting an item of information that turns out to be inaccurate.

[8] FTC Statement of General Policy or Interpretation, Commentary on the Fair Credit Reporting Act, Rescission of Commentary, 76 Fed. Reg. 44,462, 44,463 (July 26, 2011). Interagency and CFPB guidelines provide new guidance, but reference to reputable sources is notably absent. 12 C.F.R. § 1022.42, App. E (2011).

as interpreted by Equifax, that a credit reporting agency's procedures are reasonable as a matter of law whenever the credit reporting agency simply repeats information from a reputable source."). While accurate reporting of matters of public record should be per se "reasonable," divergent interpretations of FCRA thrusts providers and users into a precarious position of liability.[9]

A similar example of the potential exposure under the Ninth Circuit's interpretation of standing for defendants dealing with public records is found in cases involving the Driver Privacy Protection Act ("DPPA") 18 U.S.C. § 2721, which permits liquidated damages for plaintiffs of not less than $2,500 for violations. 18 U.S.C. § 2724(b)(1). DPPA prohibits a private individual from "knowingly... obtain[ing] or disclos[ing] personal information, from a motor vehicle record, for any use not permitted under section 2721(b)." 18 U.S.C. § 2722(a). DPPA also provides for a private right of action for those whose information was obtained or disclosed in violation of the Act. 18 U.S.C. § 2724(a).

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[9] Beyond sound policy and statutory reasons for records to be faithfully reproduced, companies reporting public records have First Amendment rights to do so. As this Court has recognized, transmitting information contained in consumer reports is a form of speech. *See Dun & Bradstreet, Inc.* v. *Greenmoss Builders, Inc.*, 472 U.S. 749, 762 n.8 (1985); *see also Sorrell* v. *IMS Health*, 131 S. Ct. 2653, 2667 (2011). In considering California's so-called "Freeze Statute" that enables a consumer to put a hold on her credit report, a state appellate court held, in favor of a credit reporting agency, the provision "unconstitutional as applied to plaintiff who... provides credit reports drawn in material part from public records including court documents." *U.D. Registry, Inc.* v. *State of California*, 2006 Cal. App. LEXIS 1693 (Cal. App. 2d Dist., Oct. 30, 2006).

In *Graczyk* v. *West Publ'g Corp.*, No. 09-C-4760, 2009 WL 5210846, 2009 U.S. Dist. Lexis 120256 (N.D. Ill. Dec. 23, 2009), the defendant's "liability under [DPPA] would potentially be in the billions of dollars in liquidated damages." *Id.* at *18. Plaintiff alleged that defendant obtained plaintiff's personal information from state Department of Motor Vehicle ("DMV") records and resold the information in violation of DPPA. *Id.* at *2. The district court held that the plaintiff lacked standing. *Id.* at *20. The Seventh Circuit reversed the finding of no standing. *See Graczyk* v. *West Publ'g Corp.*, 660 F.3d 275 (7th Cir. 2011); *see also Taylor* v. *Acxiom Corp.*, 612 F.3d 325 (5th Cir. 2010). The court held that standing existed based purely on DPPA's private right of action. *Graczyk*, 660 F.3d at 278.[10]

B. No-Injury Lawsuits Under RESPA, With Treble Damages, Are Commonplace, Even When The Consumer Was Satisfied And Was Provided With Good Service And Pricing.

Many of amicis' members have also been subject to RESPA class action lawsuits in which the named plaintiffs were completely uninjured and only brought suit after being solicited and told they were wronged and could recover apparently automatic damages.

RESPA claims are a magnet for the plaintiff's bar because Section 8(d)(2) provides that any "person or persons who violate the prohibitions or limitations of this section shall be jointly and severally liable to the

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[10] While defendants withstood massive exposure on alternative grounds for dismissal, interpreting Article III to permit such no-injury cases, as the Seventh Circuit did, will no doubt force some companies to settle in this type of "bet-the-company" case.

person or persons charged for the settlement service involved in the violation in an amount equal to three times the amount of any charge paid for such settlement service," 12 U.S.C. § 2607(d)(2), and many courts have held such treble damages to be available even when—as is often the case—there is no actual injury.[11]

This Court is familiar with the facts of *Edwards* v. *First Am. Corp.* In that case, pursuant to RESPA Section 8(a), the plaintiff alleged that First American unlawfully paid a "kickback" to numerous title agencies by purchasing an interest in the agencies for more than their market value, in expectation of future referrals. App. 58a (Compl. ¶ 41).[12] Plaintiff

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[11] In addition, while Section 8(d)(5) expressly provides for costs and reasonable attorney's fees "to the prevailing party," *id.* at § 2607(d)(5), the few courts that have interpreted that provision have held that RESPA is analogous to the civil rights laws (even though RESPA does not even provide a private right to seek injunctive relief) and have denied attorneys' fees for prevailing defendants unless the cases were "frivolous, unreasonable or without foundation." *See, e.g.*, *Lane* v. *Residential Funding Corp.*, 323 F.3d 739, 746-48 (9th Cir. 2003). These circumstances unfortunately have created a "cottage industry" of lawsuits brought under § 8, many of which involve lawyers who shop for representative plaintiffs and file class action lawsuits in their name based on a purported technical violation of the statute, hoping to obtain a quick settlement. Based on the potentially enormous exposure involved in a putative class action under RESPA Section 8 (not to mention the costs involved with protracted litigation and discovery) plus an interpretation that only provides prevailing plaintiffs with attorneys' fees, it is not uncommon to see settlements in such cases yielding millions of dollars in funds for attorneys' fees and for consumers who never have been damaged or injured by the purported violation.

[12] Citations to the Appendix accompanying the petition for a writ of certiorari are cited as "App. _" and citations to the Joint

did not claim that she suffered any financial or other actual harm, since, as the Court of Appeals recognized, she did not contend that these alleged kickbacks increased the cost of her title insurance or otherwise affected the quality of services she received from First American. *See, e.g.*, App. 4a; App. at 49a (Compl. ¶ 5) (complaining only of allegedly missing "information about the costs").[13]

Ms. Edwards' claims are typical of class actions brought under RESPA, which are often pursued without the plaintiffs having any ability to allege injury-in-fact, and appear to be more driven by plaintiffs' counsel than any desire on the part of the plaintiff to have an injury rectified.

To give the Court a ground-level appreciation of these types of cases, many occurring under RESPA Section 8,[14] amici briefly provide an account of another bet-the-company RESPA case, which certain

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Appendix are cited as "J.A. _."

[13] In fact, it was undisputed that, based on the State of Ohio's filed rate regulatory regime, all title insurance available in Ohio at the time of Ms. Edwards' purchase was offered at the same price. App. 14a (noting that Ms. Edwards "admit[ted] that the cost of title insurance in Ohio is regulated so that all insurance providers charge the same price"); *cf.* Br. in Opp. at 6 & n.3. As recognized below, Ms. Edwards did not allege that "the charge for title insurance was higher than it would have been without the [alleged] exclusivity agreement." App. 4a. "Plaintiff does not and cannot make this allegation because Ohio law mandates that all title insurers charge the same price." *Id.* Ms. Edwards also did not allege she received inadequate (or less) value from First American. In other words, she did not allege that she could have received better service from another title insurer.

[14] Section 8 of RESPA prohibits the payment of referral fees and splitting unearned fees in residential real estate transactions. 12 U.S.C. § 2607(a).

of their members have had to litigate despite the complete lack of any injury to the plaintiffs.

In *Minter* v. *Wells Fargo Bank, N.A.*, the plaintiffs challenged a longstanding mortgage joint venture between an affiliate of Wells Fargo Bank, N.A. ("Wells Fargo") and an affiliate of Long & Foster Real Estate, Inc. ("Long & Foster"), the largest privately owned real estate broker in the country.[15] No. WMN-07-3442, 2013 U.S. Dist. LEXIS 122344 (D. Md. Aug. 28, 2013), aff'd, 762 F.3d 339 (4th Cir. 2014). The case was one of many similar types of cases pursued as class actions, frequently by the same class counsel. *See, e.g.*, *Robinson* v. *Fountainhead Title Group Corp.*, 252 F.R.D. 275 (D. Md. 2008); *see also Benway* v. *Res. Real Estate Servs., LLC*, 239 F.R.D. 419 (D. Md. 2006).

The *Minter* case is unusual, not because the plaintiffs pursued a class action under RESPA despite suffering no injury-in-fact, but because the defendants were willing to risk so much to prove that they were right. Many other defendants facing similar allegations (against the same plaintiffs' counsel) had simply settled rather than risking further litigation.[16] The *Minter* case demonstrates

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[15] Wells Fargo and Long & Foster are members of one and two amici, respectively.

[16] *See* Order Granting Mot. by Pls. to Approve Am. Settlement Agreement and Certifying Settlement Class, *Benway*, No. 1:05-cv-03250-WMN (D. Md. Oct. 12, 2011), ECF No. 191; *see also* Final Order Approving Settlement and Certifying Settlement Class, *Robinson*, No. 1:03-cv-03106-WMN (D. Md. Oct. 7, 2010), ECF No. 198; Order Granting Pls.' Mot. for Final Approval of Class Action Settlement, *Brittingham* v. *Prosperity Mortg. Co.*, No. 1:09-cv-00826-WMN (D. Md. Aug. 24, 2010), ECF No. 77; Final Order Approving Settlement and Certifying Settlement

the risk, and costs, of seeing such litigation through to the end.

The *Minter* plaintiffs alleged that the joint venture, Prosperity Mortgage Company ("Prosperity"), was a "sham" provider under criteria contained in a RESPA policy statement[17] and existed as a pretext to pay unlawful referral fees, in claimed violation of RESPA Section 8. The plaintiffs claimed that the former Prosperity customers in each of the approximately 150,000 loan transactions at issue[18] were entitled to automatic treble damages under RESPA Section 8(d)(2), which would have surpassed a billion dollars in total,[19] an amount that was many

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Class, *Yates* v. *All Am. Abstract Company, Inc.*, No. 2:06-cv-02174-HB (E.D. Pa. July 8, 2008), ECF No. 71; Final Order Approving Settlement and Certifying Settlement Class, *McManus* v. *Fountainhead Title Grp. Corp.*, No. 1:03-cv-02813-WMN (D. Md. Jan. 18, 2006), ECF. No. 26; Final Order Approving Settlement and Certifying Settlement Class, *Gray* v. *Fountainhead Title Grp. Corp.*, No. 1:03-cv-01675-WMN (D. Md. Aug. 30, 2004), ECF. No. 43.

[17] Statement of Policy 1996-2 Regarding Sham Controlled Business Arrangements, 61 Fed. Reg. 29,258 (June 7, 1996), issued by the United States Department of Housing and Urban Development ("HUD"), which until July 2011 had the authority to enforce RESPA.

[18] The total number of Prosperity loans in *Minter* obtained by members of a timely class as well as an untimely class that sought to toll the RESPA statute of limitations, was 143,495. *See* [Proposed] Joint Pretrial Order at 3 and 77, *Minter*, No. WMN-07-3442 (D. Md. Apr. 19, 2013), ECF No. 513. The untimely class was decertified and the timely class was narrowed just before trial. *See* Memorandum at 7-18, *Minter*, No. WMN-07-3442 (D. Md. Apr. 26, 2013), ECF No. 541.

[19] The *Minter* timely class originally involved approximately 63,349 Prosperity loans. *See* [Proposed] Joint Pretrial Order at 24, *Minter*, No. WMN-07-3442 (D. Md. Apr. 19, 2013), ECF No.

times the sum of Prosperity's net income over its then-twenty year history.[20]

As is unfortunately commonplace in these cases, none of the named representative plaintiffs had had any issue with their transactions until they were contacted unsolicited by class counsel to participate in the lawsuit;[21] two of the plaintiffs had been so pleased with their transaction that they sent their

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513. The plaintiffs claimed that the fees subject to damages trebling included: (a) all Prosperity fees listed on class member settlement statements for "origination," "application," "processing," "underwriting," and similar services, and (b) all service release fees for such loans (*i.e.*, payments Prosperity received from the sale of those closed loans to the secondary mortgage market). *Id.* at 70-71. This theory would have yielded $9,965.01 in statutory damages (trebled) for representative plaintiff Ms. Minter alone, and hundreds of millions of dollars in statutory damages for the class. Had the untimely class not been decertified, damages likely would have exceeded a billion and a half dollars. *Id.* at 77.

[20] *See* Declaration of Brian M. Forbes at ¶ 11, *Minter*, No. WMN-07-3442 (D. Md. Apr. 19, 2013), ECF No. 421.

[21] The regulation of attorney solicitation is addressed by laws and ethics rules of the states. Amici raise the factual points here only to highlight that these types of class actions are frequently not initiated by plaintiffs seeking to right some perceived wrong. Another example of this, from another member of an amici, is a RESPA case, *Busby* v. *JRHBW Realty Inc.*, No. 2:04-CV-2799-VEH, 2012 U.S. Dist. LEXIS 145037 (N.D. Ala 2012), which took eight years to litigate before the defendant prevailed. In *Busby*, the named plaintiff had been contacted by an attorney several months after her closing transaction to see if she wanted to pursue a case. *See Busby*, 513 F.3d 1314 (11th Cir. 2008), and record thereto including Exhibit F to RealtySouth's Memorandum in Opposition to Plaintiff's Motion for Class Certification (excerpts from the Deposition of Vicky V. Busby) at 111-13, *Busby*, No. 2:04-CV-2799-VEH (N.D. Ala. Apr. 13, 2006), ECF No. 67-3.

Prosperity loan officer and Long & Foster real estate agent thank you notes and gifts after their closing, and the other plaintiff at one point made inquiry about potentially obtaining a commercial loan.[22]

Nonetheless, the *Minter* litigation further revealed that neither the named plaintiffs nor the class members had suffered any financial injury. The *Minter* trial court excluded expert testimony regarding Prosperity's loan prices (which was uncontroverted and showed the loans typically were lower than other Wells Fargo branches and the marketplace generally[23]), and excluded all other

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[22] *See* Day Four Transcript Of Proceedings Before The Honorable William M. Nickerson, United States District Senior Judge at 120-21, 180-82, *Minter*, No. WMN-07-3442 (D. Md. Jul. 9, 2013), ECF No. 643 (before she received an attorney solicitation letter, Ms. Minter was satisfied with her transaction and had even gone back to Prosperity to inquire about a possible commercial loan); *see also* Day Eight Transcript Of Proceedings Before The Honorable William M. Nickerson, United States District Senior Judge at 153-54, *Minter*, No. WMN-07-3442 (D. Md. Jul. 9, 2013), ECF No. 647 (the Alborough plaintiffs in the case had been satisfied with their transaction and had sent a thank you card and gift card to their Prosperity loan officer); Day Fourteen Transcript Of Proceedings Before The Honorable William M. Nickerson, United States District Senior Judge at 84-85, *Minter*, No. WMN-07-3442 (D. Md. Jul. 9, 2013), ECF No. 653 (the Alboroughs also thanked their Long & Foster real estate agent for helping them with their home purchase and sent him a thank you card and gift card).

[23] *See* Plaintiffs' Motion *In Limine* No. 1 (Courchane Testimony) and Plaintiffs' Memorandum in Support of Motion *In Limine* No. 1 (Courchane Testimony), *Minter*, No. WMN-07-3442 (D. Md. Jul. 9, 2013), ECF Nos. 484 and 484-1; *see also* Exhibit C to Plaintiffs' Motion *In Limine* No. 1 (Courchane Testimony) at 6-8, 23, *Minter*, No. WMN-07-3442 (D. Md. Jul. 9, 2013), ECF No. 484-5 (Dr. Marsha Courchane expert report for the defense, concluding that Prosperity borrowers received competitive loan

testimony, evidence or argument about whether plaintiffs suffered economic injury. The purported rationale was that the plaintiffs were not required to establish economic injury to prove their RESPA claim, notwithstanding that they sought over a billion dollars in damages at the time of that ruling. *See* n.19 *supra*; *see also Minter v. Wells Fargo Bank, N.A.*, 762 F.3d 339, 350 (D. Md. 2014).

While the *Minter* trial court ultimately allowed the defendants to adduce some limited testimony from their own witnesses and cross-examination testimony about Prosperity's generally competitive loan pricing, it instructed the jury that there was no requirement that the plaintiffs prove economic harm and no other harm was alleged. *See id.* at 350-51.

After a trial that lasted seventeen days and had over twenty witnesses, the defendants prevailed on the RESPA claims with a jury verdict in less than three hours.[24] Yet the *Minter* plaintiffs' ability to demand potentially annihilative treble damages when the class was not even injured is contrary to Article III and untenable. *See, e.g., Stillmock* v. *Weis Mkts., Inc.*, 385 Fed. Appx. 267, 278 (4th Cir. 2010)(Wilkinson, J., concurring)("Certifying a class action that would impose annihilative damages where there has been no actual harm from identity theft could raise serious constitutional concerns, as plaintiffs themselves admit."). Moreover, this no-injury class action cost the three defendants millions of dollars to successfully defend.

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prices that "were not inflated or distorted" and that "reflect[ed] no systematic overcharging of Prosperity . . . borrowers.").

[24] *See Minter v. Wells Fargo Bank, N.A.*, 762 F.3d at 351; *see also Minter*, 2013 U.S. Dist. LEXIS 122344, at *3 & n.2.

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The examples above are just some of the cases, and some of the statutes, that raise threats of virtually, or actual, annihilative damages for companies even when they have meritorious defenses. There are numerous other federal and state statutes that pose similar risks to defendants in connection because they provide private rights of action along with statutory damages for violations, and thus would likewise permit no-injury cases to be pursued under the Ninth Circuit's rule.[25]

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[25] Articles abound about the class actions pursued under the Telephone Consumer Protection Act, 47 U.S.C. § 227(3), even when the calls are related to health care messages that the Department of Health and Human Services tries to encourage. *See, e.g.*, Anna Watterson, *Expect TCPA Suits Over Prescription Messages in 2015*, Law 360 (January 6, 2015, 12:51 PM ET), http://www.law360.com/articles/608314/expect-tcpa-suits-over-prescription-messages-in-2015. To cite just a couple of additional examples, courts also have permitted claims to proceed with no allegation of actual injury in fact under the Truth In Lending Act ("TILA"), 15 U.S.C. § 1601, *et. seq.*, and the Electronic Funds Transfer Act ("EFTA"), 15 U.S.C. § 1693m(a)(2). *See, e.g.*, *Charvat* v. *Mut. First Fed. Credit Union*, 725 F.3d 819, 822-24 (8th Cir. 2013) (holding that an ATM customer had standing to bring a claim against two banks for an alleged violation of the former "on machine" notice provision of the EFTA because the denial of a statutory right to receive information was sufficient injury that was directly related to his claim for damages); *Purtle* v. *Eldridge Auto Sales, Inc.*, 91 F.3d 797, 802 (6th Cir. 1996) (holding claim could proceed under TILA without any "actual damage"); *Gambardella* v. *G. Fox & Co.*, 716 F.2d 104, 108 n.4 (2d Cir. 1983) (same); *see also Traylor* v. *United Cash Sys., LLC*, No. 3:12-cv-01006 (MPS), 2014 U.S. Dist. LEXIS 179496, at *7 (D. Conn. Nov. 10, 2014)("[E]ven if Traylor has not shown actual economic damages Traylor is still entitled to bring an action under the EFTA purely for statutory damages.").

The Ninth Circuit's decision, and others like it, poses a major threat to the Article III limits on the role of federal courts. As this Court has repeatedly recognized, while Congress has the power to create new legal rights and causes of action where none previously existed, Article III of the Constitution requires a plaintiff to have suffered injury-in-fact before he or she can take advantage of federal courts. Congress's establishment of laws that contain statutory damages provisions does not change this fundamental separation of the legislative and judicial functions, and the Ninth Circuit's decision to the contrary cannot be reconciled with this Court's longstanding Article III jurisprudence.

While defendants may (if they are willing to accept the risks) ultimately prevail in a federal class action that is based solely on an alleged statutory violation without an injury-in-fact, allowing such an action to go forward is inefficient and wasteful. More to the point, the Constitution requires that a defendant in such circumstances should not need to continue litigating a case through class certification, or summary judgment, or trial.

II. ENFORCEMENT OF THE LAW AND DETERRENCE ARE STILL ACHIEVED IF PRIVATE DAMAGE RECOVERIES ARE RESTRICTED TO SITUATIONS WHERE INJURY IS ACTUALLY ALLEGED AND CAN BE PROVEN.

A. Congress Provided Multiple Avenues For Enforcement Of The Consumer Protection Statutes.

Full enforcement of Article III's requirements will not permit no-harm statutory violations to go

unchecked. Where Congress determines that actual and widespread violations of statutes should be addressed notwithstanding the absence of any actual injury to consumers, it can (and generally does) provide for regulatory enforcement and even criminal enforcement.[26] FCRA, RESPA, and many other statutes with apparently automatic damages provisions are enforced or subject to audit by multiple regulatory agencies, including the CFPB, the FTC, the federal banking agencies, the Administrator of the National Credit Union Administration, the Secretary of Transportation, the Secretary of Agriculture, the Commodity Futures Trading Commission, the Securities and Exchange Commission, a host of state financial and insurance agencies, and the state attorneys general. *See* 15 U.S.C. § 1681s(b)(1)(A)-(G); 12 U.S.C. §§ 1818(b)(1) and 1818(i)(2).

In particular, since its creation in 2011, the CFPB has had enforcement authority over RESPA and FCRA.[27] When Congress created the CFPB, it

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[26] For example, section 8 of RESPA provides for both civil and criminal remedies. *See* 12 U.S.C. § 2607(d)(1)(providing for a one-year imprisonment term and/or a $10,000 fine.).

[27] *See* 12 U.S.C. §§ 5581 and 5582 (providing that the CFPB assumed responsibility for its functions on July 21, 2011). As of January 20, 2012, the CFPB and the FTC (which previously had primary enforcement authority for FCRA) entered into an Interagency Cooperation Agreement concerning the enforcement of FCRA. *See* Memorandum of Understanding Between the Consumer Financial Protection Bureau and the Federal Trade Commission, *available at* https://www.ftc.gov/policy/cooperation-agreements/ftc-cfpb-interagency-cooperation-agreement(last modified March 12, 2015); *see also* 15 U.S.C. §§ 1681(a)(1) and 1681(b)(1).

provided the agency with an enormous budget,[28] increased the agency's regulatory authority and gave the CFPB the power to regulate "the offering and provision of consumer financial products or services under the Federal consumer financial laws." 12 U.S.C. § 5491(a). The CFPB's enforcement power includes the ability to conduct investigations and bring enforcement actions, including issuing civil investigation demands ("CIDs"). 12 U.S.C. § 5562. CIDs provide the CFPB with administrative subpoena power to demand the production of documents or to provide oral testimony. *Id.* Moreover, the CFPB has a choice of forums. It may bring an administrative proceeding before an administrative law judge, or commence a civil enforcement action in federal district court. *Id.*; *see also* 12 U.S.C. § 5565.[29]

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[28] The CFPB's operations are funded principally by transfers made by the Board of Governors of the Federal Reserve System from the combined earnings of the Federal Reserve System, up to the limits set forth in the Dodd-Frank Act, which in FY 2015 were $618.7 million and are expected to be $631.7 million in FY 2016. *See* The CFPB Strategic Plan, Budget, and Performance Plan and Report (February 2015), *available at* http://files.consumerfinance.gov/f/201502_cfpb_report_strategic-plan-budget-and-performance-plan_FY2014-2016.pdf.

[29] In its Bulletin regarding FCRA's requirement that furnishers conduct investigations of disputed information, the CFPB reminded furnishers that if it "determines that a furnisher has engaged in any acts or practices that violate FCRA or other Federal consumer financial laws and regulations, it will take appropriate corrective measures, including remediation of harm to consumers." CFPB Bulletin 2014-01 (February 27, 2014), *available at* http://files.consumerfinance.gov/f/201402_cfpb_bulletin_fair-credit-reporting-act.pdf; *see also* CFPB Bulletin 2013-09 (September 4, 2013), available at http://files.consumerfinance.gov/f/201309_cfpb_bulletin_furnishe

In the event that the CFPB identifies a violation, it has the ability to levy civil money penalties ranging from $5,000 per day to $1,000,000 per day for each day the violation occurred. *See* 12 U.S.C. § 5565(c)(2). In addition, Dodd Frank requires the CFPB to use these civil penalty funds for payments to the victims of activities for which civil penalties have been imposed. *See* 12 U.S.C. § 5497(d) (establishing Civil Penalty Fund to collect any civil penalty that the CFPB collects against any person in any judicial or administrative action under Federal consumer financial laws and providing that amounts in the Civil Penalty Fund shall be available to the CFPB for payments to the victims of activities for which civil penalties have been imposed). The CFPB also has access to equitable remedies, including comprehensive injunctive relief, disgorgement, rescission, restitution, public notification regarding the violation, including the costs of notification, and the ability to limit the activities or functions of the person, among others. *See* 12 U.S.C. § 5565.

The CFPB has not been shy about utilizing its enforcement authority. It has aggressively enforced RESPA. For example, in April 2013, the CFPB brought RESPA enforcement actions against four mortgage insurers alleging, *inter alia*, unlawful kickbacks related to certain captive reinsurance arrangements.[30] The CFPB settled its allegations with those defendants (*see id.*), but tried similar

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rs.pdf.

[30] *See* Press Release, CFPB, *The CFPB Takes Action Against Mortgage Insurers to End Kickbacks to Lenders* (Apr. 4, 2013), http://www.consumerfinance.gov/newsroom/the-cfpb-takes-action-against-mortgage-insurers-to-end-kickbacks-to-lenders/.

RESPA claims against mortgage provider PHH Corp. ("PHH") before an administrative law judge ("ALJ") in 2014.[31] When PHH appealed the ALJ's Recommended Decision finding that PHH's captive reinsurance practices had violated RESPA Section 8(a) to the Director of the CFPB, the Director increased the amount PHH was ordered to pay the CFPB from approximately $6 million to $109 million. *In the Matter of PHH Corporation, et al.*, Decision of the Director, No. 2014-CFPB-0002, Dkt. 226 (June 4, 2015).[32]

In the past four years, the CFPB has brought numerous other public RESPA enforcement actions, in federal court and administratively, against both large and small residential real estate service providers (mortgage lenders, mortgage brokers, real estate brokerage companies, title insurance companies, homebuilders and law firms), and has investigated many more privately. In connection with its RESPA enforcement actions, the CFPB has imposed millions of dollars in penalties and other remedies, enjoined defendants from future violations, and has restricted conduct (and in some cases the

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[31] *See* Press Release, CFPB, *CFPB Takes Action Against PHH Corporation for Mortgage Insurance Kickbacks* (Jan. 29, 2014), http://www.consumerfinance.gov/newsroom/cfpb-takes-action-against-phh-corporation-for-mortgage-insurance-kickbacks/; *see also In the Matter of PHH Corporation, et al.*, Recommended Decision, No. 2014-CFPB-0002, Dkt. 205 (Nov. 25, 2014).

[32] PHH appealed this decision to the United States Court of Appeals for the District of Columbia Circuit. *PHH Corporation, et al.* v. *CFPB, appeal docketed*, No. 15-1177 (D.C. Cir. June 19, 2015).

ability to participate in the industry), among other relief.[33]

The CFPB also has actively enforced FCRA. *See, e.g., In the Matter of: First Investors Financial Serv. Grp., Inc.*, Administrative Proceeding File No. 2014-CFPB-0012, Consent Order, Dkt. 1 (filed August 20, 2014) (Administrative action against a furnisher of information alleging that the furnisher failed to establish and/or implement reasonable written policies and procedures regarding the "accuracy" and "integrity" of the information relating to consumers that it furnishes); *see also In the Matter of DriveTime Automotive Grp., Inc. and DT Acceptance Corp.*, Administrative Proceeding File No. 2014-CFPB-0017, Dkt. 1 (filed November 19, 2014) (Administrative action alleging among other claims that a furnisher of information furnished information to consumer reporting agencies that it had reasonable cause to believe was inaccurate). In addition to the CFPB's authority, the FTC retained its authority for FCRA and is active as well.[34]

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[33] *See, e.g.*, numerous CFPB Press Releases regarding similar regulatory actions that resulted in differing civil money penalties, at http://www.consumerfinance.gov/newsroom/Press Release.

[34] *See United States* v. *Telecheck Servs., Inc., et. al.*, No. 1:14-cv-00062 (D.D.C. Jan. 16, 2014). ECF No. 3. The FTC settled its claims against a consumer reporting agency that alleged that the consumer reporting agency failed to follow procedures to ensure the accuracy of consumer credit information. In that case, the consumer reporting agency agreed to pay $3.5 million, to modify its business practices and to submit to the FTC's compliance monitoring for the next ten years. *Id.* The Stipulated Final Judgment and Order for Civil Penalties, Permanent Injunction and Other Equitable Relief are available at https://www.ftc.gov/enforcement/cases-proceedings/112-

In fact, Spokeo agreed to the entry of a Consent Decree and Order For Civil Penalties, Injunction and Other Relief, pursuant to which it agreed to pay the FTC $800,000 as a civil penalty for violations of FCRA.[35]

B. The States, With Their Attorneys General, Have Extensive Authority To Enforce FCRA, RESPA And Similar Statutes To Provide Superior Relief For Consumers.

In addition to federal agency enforcement, state attorneys general provide consumer protection in pervasive ways. Certain federal statutes containing statutory damages provisions, including FCRA and RESPA, explicitly empower state attorneys general to enforce violations. *See* 15 U.S.C. § 1681s(c)(1); 12 U.S.C. § 2607(d)(4). In doing so, attorneys general can join federal agencies. In January 2015, the CFPB and the Maryland Attorney General took action against two banks for alleged RESPA violations requiring $26.6 million in civil penalties plus $11.1 million redress directly to consumers. *State of Maryland et al.* v. *Wells Fargo Bank, N.A. et. al.*, Case No. 1:15-cv-00179-RDB (D. Md. 2015).

Second, attorneys general and other state enforcers can enforce any CFPB regulation, including rules under TILA, with new authority gained under Dodd Frank. *See* 12 U.S.C. § 5552. In December 2014, the New York Department of Financial Services brought an action relying on Dodd Frank authority with a TILA allegation against an auto

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3183/telecheck-services-inc (last modified Jan. 16, 2014).

[35] *United States* v. *Spokeo*, Case No. 2:12-cv-05001-MMM-SH, Dkt. 4 (C.D. Cal. June 19, 2012).

lender resulting in the surrender of all licenses, a $3 million penalty and restitution to consumers nationwide. *See Lawsky* v. *Condor Capital Corp., et al.*, Case No. 1:14-cv-02863-CM (S.D.N.Y 2014).

Third, attorneys general can bring their own state claims to bolster federal claims. In June 2014, the Mississippi Attorney General brought an action based on FCRA, Dodd-Frank and his state consumer protection act seeking statutory damages and consumer restitution. See *State of Mississippi* v. *Experian Info. Solutions, Inc.* Case No. 1:14-cv-243LG-JMR (S.D. Miss. 2014).

Fourth, attorneys general form multi-state actions to enforce federal law and state laws. On May 20, 2015, thirty-one (31) state attorneys general settled FCRA and state unfair and deceptive acts and practices claims with the three major credit bureaus for $6 million and an agreement to revamp their practices on disputed consumer information. *In the Matter of: Equifax Info. Servs. LLC, et al.*, Assurance of Voluntary Compliance/Assurance of Voluntary Discontinuance (May 20, 2015), *available at* http://www.ohioattorneygeneral.gov/Files/Briefing-Room/News-Releases/Consumer-Protection/2015-05-20-CRAs-AVC.aspx; *see also Minnesota* v. *U.S. Bank N.A.*, Case No. 0:99-cv-872 (D. Minn. 1999) (complaint brought by 29 states, and settled, for alleged violations of FCRA and state consumer-fraud and deceptive-advertising laws).

Fifth, in bringing state claims, attorneys general can sue *parens patriae*, acting on behalf of citizens suffering injury, under state consumer protection statutes. *See West Virginia* v. *CVS Pharm., Inc.*, 646 F.3d 169 (4th Cir. 2011) (seeking treble damages

relief for consumers, in addition to civil penalties under West Virginia Consumer Credit Protection Act).

In sum, there are robust mechanisms in place to police statutory violations, and those mechanisms are far superior than the phenomenon of the no-injury class action, which does violence to well-established Article III standing requirements.

CONCLUSION

For the reasons stated above, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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REPLY BRIEF

SEP - 8 2015

No. 13-1339

IN THE

Supreme Court of the United States

SPOKEO, INC.,

Petitioner,

v.

THOMAS ROBINS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICUS CURIAE*	1
INTRODUCTION AND SUMMARY OF ARGUMENT	1
ARGUMENT	5
I. THE TEXT AND HISTORY OF ARTICLE III GIVE THE FEDERAL COURTS BROAD JUDICIAL POWER TO ENFORCE FEDERAL LAWS, COEXTENSIVE WITH THE LEGISLATIVE POWERS OF CONGRESS UNDER ARTICLE I	5
II. THE FRAMERS WROTE ARTICLE III TO ENSURE THAT WHERE THERE IS A LEGAL RIGHT, THERE IS A LEGAL REMEDY FOR INFRINGEMENT OF THE RIGHT.	11
III. THE ORIGINAL MEANING OF ARTICLE III DOES NOT LIMIT THE POWER OF CONGRESS TO CREATE JUDICIAL REMEDIES FOR VIOLATION OF INDIVIDUAL, FEDERAL STATUTORY RIGHTS.	16
IV. SUPREME COURT PRECEDENT AFFIRMS THE BROAD POWER OF CONGRESS TO PRESCRIBE JUDICIAL REMEDIES FOR VIOLATION OF FEDERALLY-PROTECTED INDIVIDUAL RIGHTS.	20
CONCLUSION	26

TABLE OF AUTHORITIES

Page(s)

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1 Hill 484 (N.Y. Sup. Ct. 1841) 15

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(1703) 92 Eng. Rep. 126 (Q.B.), *rev'd*,
(1703) 91 Eng. Rep. 665 ..... 13, 14

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19 U.S. (6 Wheat.) 264 (1821) 5, 7, 9, 18

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489 U.S. 749 (1989) 25

Embrey v. Owen,
(1851) 155 Eng. Rep. 579 14

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524 U.S. 11 (1998) 22

Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340 (1998) 18, 19

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390 U.S. 1 (1968) 22

Havens Realty Corp. v. Coleman,
455 U.S. 363 (1982) 22, 23

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4 Ga. 241 (1848) 15

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37 U.S. (12 Pet.) 524 (1838) 13

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Page(s)

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134 S. Ct. 1377 (2014) 23

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504 U.S. 555 (1992) 21, 23, 24

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14 U.S. (1 Wheat.) 304 (1816) 12

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199 U.S. 212 (1905) 20

Massachusetts v. EPA,
549 U.S. 497 (2007) 21, 25

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17 Conn. 288 (1846) 15

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554 U.S. 269 (2008) 16

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555 U.S. 488 (2009) 24

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Page(s)

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529 U.S. 765 (2000) 16, 20

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422 U.S. 490 (1975) 21

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29 F. Cas. 506 (C.C.D. Me. 1838) 15

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27 U.S. (2 Pet.) 449 (1829) 17

Whipple v. Cumberland Mfg. Co.,
29 F. Cas. 934 (C.C.D. Me. 1843) 15

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TABLE OF AUTHORITIES – cont'd.

Page(s)

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TABLE OF AUTHORITIES – cont'd.

Page(s)

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and preserve the rights and freedoms it guarantees. CAC has a strong interest in ensuring meaningful access to the courts, in accordance with constitutional text, history, and values, and accordingly has an interest in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

Respondent Thomas Robins sued petitioner Spokeo, Inc. pursuant to the Fair Credit Reporting Act for disseminating false credit information about him. Although the Act explicitly provides a consumer the right to sue for damages to enforce the Act's prohibitions, see 15 U.S.C. §§ 1681n, 1681o, Spokeo argues that this suit is not a "Case[] arising under the Laws of the United States," U.S. Const. art. III, § 2, cl. 1, and that Congress lacks the power under the Constitution to provide Robins with a right to sue for damages to vindicate his rights under the Act. Spokeo's crabbed interpretation of the judicial

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[1] The parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk. Under Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

power vested in the federal courts by Article III cannot be squared with the Constitution's text and history or this Court's precedents.

Three precepts firmly embedded in the text and history of Article III control this case. First, Article III created a federal judiciary with broad power to protect individual rights secured by federal law by ensuring that the power of the federal courts to enforce federal law was co-extensive with the legislative powers of Congress under Article I. When the Framers wrote our founding charter more than two centuries ago, they were concerned that federal laws had been reduced to dead letters under the dysfunctional government of the Articles of Confederation because of the "want of a judiciary power," *The Federalist No. 22*, at 118 (Alexander Hamilton) (Clinton Rossiter ed., 1961), and they recognized that "[a]n effective Judiciary establishment commensurate to the legislative authority, was essential." 1 *The Records of the Federal Convention of 1787*, at 124 (Max Farrand ed., 1911) [hereinafter *Farrand's Records*] (James Madison); *see also The Federalist No. 80*, *supra*, at 444 (Alexander Hamilton) ("If there are such things as political axioms, the propriety of the judicial power of a government being coextensive with its legislative may be ranked among the number.")

To correct this deficiency in the Articles, the Framers wrote Article III to create a federal judiciary vested with a power to enforce federal legal rights that was coextensive with the legislature's power to create them. This "co-extensiveness" principle—repeatedly invoked in the ratification debates over the Constitution—ensured that federal statutory protections, which fell within the scope of Congress' enumerated powers, could be enforced by the federal courts. Resort to the "courts of justice," the Framers

understood, "is the only natural and effectual method of enforcing laws." 4 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 146 (Jonathan Elliot ed., 1836) [hereinafter *Elliot's Debates*] (James Iredell).

Second, and intimately related to the first, the Framers wrote Article III to ensure that where there is a legal right, there is also a legal remedy. The Framers, who were steeped in English common law traditions, understood that legal rights were meaningless without the right to go to court to obtain a remedy when those rights are violated. As this Court recognized in *Marbury v. Madison*, "it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded." 5 U.S. (1 Cranch) 137, 163 (1803) (quoting 3 William Blackstone, *Commentaries on the Laws of England* *23). During the Framing era, courts in England and the United States applied this fundamental rule-of-law principle to hold that damages are available based on the violation of a legal right alone. This history by itself answers the question whether Robins has a right to go to federal court to seek redress for the violation of his legal rights under the FCRA. He plainly does.

Third, the original meaning of Article III's case or controversy limitation does not disable Congress from prescribing judicial remedies for violation of individual statutory rights. A case under Article III "arises, when some subject, touching the constitution, laws, or treaties of the United States, is submitted to the courts by a party, who asserts his rights in the form prescribed by law." 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1640, at 507 (1833); *Osborn v. Bank of U.S.*, 22 U.S. (9 Wheat.)

738, 819 (1824). Article III's limitation to what James Madison called "judiciary cases" was designed to ensure that courts did not interfere with political matters left to the other branches, not to deprive Congress of the power to prescribe judicial remedies for the violation of federally-protected individual rights. Indeed, the very first Congress exercised its constitutional authority to enable individuals to sue for damages for violations of their legal rights, enacting the nation's first copyright law and creating a statutory damages remedy not unlike the one at issue here. Where, as here, Congress has created a damages remedy to redress concrete, personal violations of federal legal rights, there is plainly a case within the original meaning of Article III.

Spokeo's reading of Article III violates each of these three fundamental, access-to-court principles rooted in the text and history of Article III. It would (1) deny Article III courts the power to enforce the full range of federal legal rights, (2) result in many cases where there are rights without remedies, and (3) sharply limit the power of Congress to prescribe judicial remedies for violations of individual rights secured by federal statutes. In all these respects, Spokeo's stingy interpretation of what constitutes a "case" under Article III cannot be squared with the Constitution's text and history.

Spokeo also argues that more general separation-of-powers principles require closing the courthouse doors to plaintiffs whose rights have been violated, insisting that a ruling in its favor is essential to protect individual liberty. Pet'r Br. at 31-32. The Framers of our Constitution had a very different understanding of liberty and of the role the courts should play in protecting liberty in our constitutional system. They recognized that "[t]he very essence of civil

liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Marbury*, 5 U.S. at 163. They understood that the best protection of individual liberty lies in an independent judiciary empowered to vindicate individual rights and enforce the rule of law.

Ultimately, Spokeo may well prevail on the merits in this case, but it is not entitled to a dismissal before Robins has his day in court. Under the text and history of Article III and this Court's precedent, Robins has standing to maintain a claim for damages for violation of FCRA's prohibitions on the dissemination of false credit information about him.

ARGUMENT

I. THE TEXT AND HISTORY OF ARTICLE III GIVE THE FEDERAL COURTS BROAD JUDICIAL POWER TO ENFORCE FEDERAL LAWS, CO-EXTENSIVE WITH THE LEGISLATIVE POWERS OF CONGRESS UNDER ARTICLE I.

Article III of the Constitution broadly extends the "judicial Power" to nine categories of cases and controversies, including "all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority " U.S. Const. art. III, § 2, cl. 1. Article III's plain language empowers the "judicial department" to "decide all cases of every description, arising under the constitution or laws of the United States," extending to the federal courts the obligation "of deciding every judicial question which grows out of the constitution and laws." *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 382, 384 (1821).

The Constitution's sweeping grant of judicial power to the newly created federal courts was a direct response to the infirmities of the Articles of Confederation, which established a single branch of the federal government and no independent court system. See Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 Yale L.J. 1425, 1443 (1987) (explaining that Confederation courts were "pitiful creatures of Congress, dependent on its pleasure for their place, tenure, salary, and power"). Under the dysfunctional government of the Articles, individuals could not go to court to enforce federal legal protections, prompting Alexander Hamilton to observe that, "[l]aws are a dead letter without courts to expound and define their true meaning and operation." *The Federalist No. 22*, *supra*, at 118 (Alexander Hamilton). The result, Madison explained, is that "acts of Cong[ress] depend[] for their execution on the will of the state legislatures," making federal laws "nominally authoritative, [but] in fact recommendatory only." James Madison, *Vices of the Political System of the United States* (Apr. 1787), *in* 9 *The Papers of James Madison* 345, 352 (Robert A. Rutland & William M. E. Rachal eds., 1975).

When the Framers gathered together in Philadelphia to create a new national charter, they took pains to ensure that the federal courts created by the new Constitution would have the power to enforce federal legal protections. Time and again, the Framers explained that the power of the courts under Article III would be co-extensive with the broad legislative powers granted to Congress under Article I. As James Madison explained, "[a]n effective Judiciary establishment commensurate to the legislative authority, was essential." 1 *Farrand's Records*, *supra*, at 124 (James Madison); *see also id.* at 128 (urging

Convention to "vest the Genl. Govt. with authority to erect an Independent Judicial, coextensive wt. ye. Nation" (James Madison)); *id.* at 147 ("[T]he Judicial, Legislative and Executive departments ought to be commensurate." (James Wilson)). The Framers understood that "[n]o government ought to be so defective in its organization, as not to contain within itself the means of securing the execution of its own laws," and gave to the federal courts "the power of construing the constitution and laws of the Union in every case and of preserving them from all violation from every quarter " *Cohens*, 19 U.S. at 387, 388.

Spokeo insists that the Framers rejected the views of those "who pressed for a federal judiciary with expansive authority to enforce federal law." Pet'r Br. at 19. Not so. Over the course of the debates in Philadelphia, the Framers took pains to ensure that "judicial authorities" were "fully and effectually vested in the general government of the Union," 2 *Farrand's Records*, *supra*, at 666, continuously expanding the jurisdiction of the federal courts.

The Virginia Plan proposed at the outset of the Convention made no explicit provision for federal question jurisdiction. Instead, it gave the federal courts the power to "hear and determine" a set of discrete cases, including "piracies & felonies on the high seas, captures from an enemy," and matters "which respect the collection of the National revenue," as well as resolve "questions which may involve the national peace and harmony." 1 *Farrand's Records*, *supra*, at 22. This final category corresponded to the Virginia Plan's grant of power to Congress "to legislate in all cases . in which the harmony of the United States may be interrupted by the exercise of individual Legislation," *id.* at 21, "contemplat[ing] a jurisdiction coterminous with the national legislative

power." Anthony J. Bellia Jr., *The Origins of Article III "Arising Under" Jurisdiction*, 57 Duke L.J. 263, 295 (2007).

Over the course of the Convention, the delegates revised the language to make even clearer that the grant of judicial power to the federal courts was not limited to discrete categories of cases, but instead encompassed all cases arising under federal law, *see* 2 *Farrand's Records*, *supra*, at 46, 186 (Report of the Committee of detail), 430-31, ensuring that the federal courts "will have a right to decide upon the laws of the United States, and all questions arising upon their construction, and in a judicial manner to carry those laws into execution " Luther Martin, Attorney General of Maryland and Convention Delegate, The Genuine Information, Delivered to the Legislature of the State of Maryland, Relative to the Proceedings of the General Convention (Nov. 29, 1787), *in* 3 *Farrand's Records*, *supra*, 172, at 220; *see* James S. Liebman & William F. Ryan, *"Some Effectual Power": The Quantity and Quality of Decisionmaking Required of Article III Courts*, 98 Colum. L. Rev. 696, 770 (1998) (discussing the Convention's "expanding 'federal question' jurisdiction"). Rather than use the vague "national peace and harmony" formulation—which Spokeo incorrectly views as the high water mark of federal court jurisdiction proposed during the Convention, Pet'r Br. at 18-19—the Framers explicitly gave to the federal courts the power to hear all cases arising under federal law, such as the damage suit brought by Robins here, ensuring that federal courts could vindicate the full range of federal rights created by Congress.

In its final form, Article III conferred on the federal courts power to hear "all those [cases] which arise out of the laws of the United States, passed in

pursuance of their just and constitutional powers of legislation." *The Federalist No. 80*, *supra*, at 443 (Alexander Hamilton). As Hamilton explained, "[i]f there are such things as political axioms, the propriety of the judicial power of a government being coextensive with its legislative may be ranked among the number." *Id.* at 444; *see also Cohens*, 19 U.S. at 384 (explaining that the principle that "the judicial power of every well constituted government must be coextensive with the legislative" "sustain[s] the words [of Article III] in their full operation and natural import"). Spokeo's argument that the changes made to Article III over the course of the Convention diminished—not expanded—federal court jurisdiction gets Article III's text and history backward.

In the ensuing debates over ratification of the Constitution, Federalists and Anti-Federalists alike agreed that Article III gave the federal courts extensive power to enforce federal legal commands. In the state ratifying conventions, supporters of the Constitution repeatedly made the case that "the judicial power ought to be coëxtensive with the legislative. The federal government ought to possess the means of carrying the laws into execution. . If laws are not to be carried into execution by the interposition of the judiciary, how is it to be done?" 4 *Elliot's Debates*, *supra*, at 158 (William Davie); *see also* 3 *id.* at 517 (insisting that "the power of that judiciary must be coëxtensive with the legislative power, and reach to all parts of society" (Edmund Pendleton)); *id.* at 532 ("[I]t is so necessary and expedient that the judicial power should correspond with the legislative " (James Madison)). Future Chief Justice John Marshall argued that it was "necessary that the federal courts should have cognizance of cases arising under the Constitution, and the laws, of the United States,"

observing that "the service or purpose of a judiciary" is to "execute the laws in a peaceable, orderly manner, without shedding blood, or creating a contest, or availing yourselves of force[.] If this be the case, where can its jurisdiction be more necessary than here?" *Id.* at 554.

Anti-Federalists complained bitterly about Article III's broad sweep, insisting that "[t]he jurisdiction of all cases arising under the Constitution and the laws of the Union is of stupendous magnitude." *Id.* at 565 (William Grayson). As one opponent of ratification of Article III argued, "[t]his is to be co-extensive with the legislature, and, like that, is to swallow up all other courts of judicature.—For what is that judicial power which 'shall extend to all cases in law and equity' but an establishment universal in its operation?" *See The Impartial Examiner I*, Va. Indep. Chron., Feb. 27, 1788, *reprinted in The Documentary History of the Ratification of the Constitution Digital Edition* (John P. Kaminski et al. eds., 2009).

These arguments did not carry the day. Rejecting Anti-Federalist claims that the breadth of judicial power conferred in Article III was too sweeping, the American people ratified the Constitution, giving to the newly created federal courts broad judicial power to ensure that "the Constitution should be carried into effect, that the laws should be executed, justice equally done to all the community, and treaties observed." 4 *Elliot's Debates*, *supra*, at 160 (William Davie). The American people recognized that "[t]hese ends can only be accomplished by a general, paramount judiciary." *Id.*

In creating an independent federal judiciary with the power to enforce federal law co-extensive with the legislative powers of Congress, the Framers incorporated long established common law principles that

allowed courts to vindicate individual rights and enforce the rule of law. The next section examines those principles.

II. THE FRAMERS WROTE ARTICLE III TO ENSURE THAT WHERE THERE IS A LEGAL RIGHT, THERE IS A LEGAL REMEDY FOR INFRINGEMENT OF THE RIGHT.

The Framers, who were steeped in the writings of Sir William Blackstone, wrote Article III to ensure that where there is a legal right, there is also a legal remedy, recognizing that legal rights are meaningless if individuals lack the ability to go to court to obtain a remedy. The Framers understood that rights and remedies must go hand in hand if courts are to play their essential role in the Constitution's system of separation of powers: expounding the law and vindicating individual liberty. As Blackstone had written, it was a "general and indisputable rule, that where there is a legal right, there is also a legal remedy, by suit or action at law, whenever that right is invaded." 3 William Blackstone, *Commentaries on the Laws of England* *23. "[I]n vain would rights be declared, in vain directed to be observed," Blackstone explained, "if there were no method of recovering and asserting those rights, when wrongfully withheld or invaded. This is what we mean properly, when we speak of the protection of the law." 1 *id.* at 55-56.

These fundamental rule-of-law values were affirmed by a number of Founding-era state constitutions, which explicitly guaranteed redress for a violation of a legal right. For example, the Massachusetts Constitution of 1780 provided that "[e]very subject . . ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property, or character. He ought to obtain right and justice freely, and without

being obliged to purchase it; completely, and without any denial; promptly, and without delay, conformably to the laws." Mass. Const. of 1780, art. XI. Other State Constitutions used similar formulations to protect the right of individuals to seek redress in the courts for violations of their legal rights. *See, e.g.*, Md. Const. of 1776, art. XVII; N.H. Const. of 1784, art. XIV; Vt. Const. of 1786, ch. 1, para. 4; Pa. Const. of 1790, art. IX, § 11; Del. Const. of 1792, art. I, § 9; Ky. Const. of 1792, art. XII, § 13; Tenn. Const. of 1796, art. XI, § 17.

In *Marbury v. Madison*, Chief Justice Marshall recognized that these fundamental rule-of-law principles were secured by the U.S. Constitution. Chief Justice Marshall's opinion in *Marbury* explained that, under Article III, the "province of the court is, solely, to decide on the rights of individuals," and he invoked Blackstone's discussion of common law principles that ensure that "'every right, when withheld, must have a remedy, and every injury its proper redress.'" *Marbury*, 5 U.S. at 170, 163 (quoting 3 Blackstone, *supra*, at *109). As *Marbury* observed, a broad understanding of the individual's right to go to court to redress violations of personal rights was necessary to ensure "the very essence of civil liberty" and ensure our Constitution's promise of a "government of laws, and not of men." *Id.* at 163. Thus, "where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, the individual who considers himself injured, has a right to resort to the laws of his country for a remedy." *Id.* at 166; *id.* at 165 (explaining that such suits are "examinable in a court of justice"); *see also Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 350 (1816) (rejecting a construction of Article III because the result "would, in many cases, be rights without corresponding reme-

dies"); *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 624 (1838) (explaining that it would be a "monstrous absurdity in a well organized government, that there should be no remedy, although a clear and undeniable right should be shown to exist").

During the Framing era, courts in both England and the United States applied the rule that where there is a legal right there is also a legal remedy to hold that individuals could sue for damages for violations of rights that did not result in concrete harm. In the celebrated case of *Ashby v. White*, (1703) 92 Eng. Rep. 126 (Q.B.)—a case Spokeo recognizes as a landmark precedent, Pet'r Br. at 24-25—Chief Judge Holt rejected the argument that a suit for damages for the denial of the right to vote "is not maintainable, because here is no hurt or damage to the plaintiff." *Ashby*, 92 Eng. Rep. at 137 (Holt, C.J., dissenting). *rev'd*, (1703) 91 Eng. Rep. 665. Holt's opinion, though delivered in dissent, "prevailed on appeal in the House of Lords" and was regarded as "correctly stating the law." F. Andrew Hessick, *Standing, Injury In Fact, and Private Rights*, 93 Cornell L. Rev. 275, 282-83 (2008); *see also* Pet'r Br. at 24 ("Chief Judge Holt's dissent in the Queen's Bench provides the most complete legal analysis supporting the ultimate decision.").

In *Ashby*, Chief Judge Holt explained that "[i]f the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it; and indeed it is a vain thing to imagine a right without a remedy." *Ashby*, 92 Eng. Rep. at 136 (Holt, C.J., dissenting). Applying that principle, Holt held the suit could proceed based on the violation of Ashby's legal right. "[S]urely every injury imports damage, though it does not cost the party one farthing, and it is im-

possible to prove the contrary; for a damage is not merely pecuniary, but an injury imports a damage, when a man is thereby hindered of his right." *Id.* at 137; *see also* Resp't Br. at 18-19 (discussing *Ashby*).

Spokeo tries to rewrite *Ashby* as a case only about the right to vote. Pet'r Br. at 25. That ploy fails. In *Ashby*, Chief Judge Holt held that an individual may sue for damages for violation of a legal right, regardless of the type of action or the nature of the right involved. To make the point, he offered an array of examples drawn from different areas of tort law. As Chief Judge Holt explained,

> [I]n an action for slanderous words, though a man does not lose a penny by reason of the speaking them, yet he shall have an action. So if a man give another a cuff on the ear, though it cost him nothing yet he shall have his action, for it is a personal injury. So a man shall have an action against another for riding over his ground, though it do him no damage; for it is an invasion of his property, and the other has no right to come there.

Ashby, 92 Eng. Rep. at 137 (Holt, C.J., dissenting); *see also Embrey v. Owen*, (1851) 155 Eng. Rep. 579, 585 ("Actual perceptible damage is not indispensable as the foundation of an action; it is sufficient to shew the violation of a right, in which case the law will presume damage; injuria sine damno is actionable, as was laid down in the case of *Ashby v. White* by Lord Holt, and in many subsequent cases " (citation omitted)).

Federal and state courts of the early republic applied *Ashby*'s reasoning, rejecting arguments—identical to those pressed by Spokeo here—that "it is

essential for the plaintiff to establish any actual damage." *Webb v. Portland Mfg. Co.*, 29 F. Cas. 506, 507 (C.C.D. Me. 1838). In *Webb*, Justice Story, riding circuit, invoked the "great case of *Ashby v. White*," holding that "[a]ctual, perceptible damage is not indispensable as the foundation of an action. The law tolerates no further inquiry than whether there has been the violation of a right. If so, the party injured is entitled to maintain his action for nominal damages, in vindication of his right, if no other damages are fit and proper to remunerate him." *Id.* at 508. Applying this principle, the *Webb* court held that a mill owner could sue an adjoining property owner for diverting water from a river, concluding that "it is not necessary in an action of this sort to show actual damage." *Id.* at 509; *see also Whipple v. Cumberland Mfg. Co.*, 29 F. Cas. 934, 936 (C.C.D. Me. 1843) (holding that "wherever a wrong is done to a right, the law imports, that there is some damage to the right, and, in the absence of any other proof of substantial damage, nominal damages will be given in support of the right" and explaining that "[t]his is a well-known and well-settled doctrine in the law" (Story, J.)); *Hendrick v. Cook*, 4 Ga. 241, 261 (1848) (rejecting the argument that "there must be some *perceptible damage* shown, to entitle the plaintiff to recover; that injury without damage, is not actionable" because "whenever there has been an illegal invasion of the *rights* of another, it is an *injury*, for which he is entitled to a remedy by an action") (emphasis in original); *Parker v. Griswold*, 17 Conn. 288, 303 (1846) ("An injury is a wrong; and for the redress of every wrong there is a remedy Where therefore there has been a violation of a right, the person injured is entitled to an action."); *Allaire v. Whitney*, 1 Hill 484, 487 (N.Y. Sup. Ct. 1841) ("[A]ctual damage is not necessary to an action.

A violation of right with a possibility of damage, forms the ground of an action."); Resp't Br. at 19-22.

This long history of common law precedents permitting actions for damages to proceed based on the violation of a legal right alone is "well nigh conclusive" here: Robins's suit for denial of his rights secured by FCRA, no less than Ashby's suit for the denial of his right to vote or Webb's suit for the unlawful diverting of water, is "'of the sort traditionally amenable to, and resolved by, the judicial process.'" *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 777-78 (2000) (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102 (1998)); *see also Sprint Commc'ns Co. v. APCC Servs., Inc.*, 554 U.S. 269, 285 (2008) (finding common law history concerning the right of assignees to sue dispositive).

III. THE ORIGINAL MEANING OF ARTICLE III DOES NOT LIMIT THE POWER OF CONGRESS TO CREATE JUDICIAL REMEDIES FOR VIOLATION OF INDIVIDUAL, FEDERAL STATUTORY RIGHTS.

The Constitution gives Congress broad powers to create judicial remedies, such as FCRA's statutory damages remedy, for violation of federally-protected individual rights. Spokeo suggests that Article III's requirement that there be a "case" or "controversy" prohibits Congress from exercising this power here, but Spokeo fundamentally misunderstands why Article III courts were limited to hearing, what James Madison called, "cases of a Judiciary Nature." 2 *Farrand's Records*, *supra*, at 430. That limitation was designed to ensure that courts did not interfere with political questions left to other branches of government, not to deprive Congress of the power to create individual statutory rights and prescribe judicial

remedies for their violation. The original meaning of the case or controversy limitation does not deprive Congress of the power to authorize individuals whose federal rights have been violated to sue for damages against alleged tort-feasors like Spokeo.

In establishing a federal judiciary with broad powers to enforce federal law, the Framers maintained a fundamental distinction between questions concerning individual rights to be decided by the courts and political matters entrusted to other branches of government. *See Marbury*, 5 U.S. at 164, 166 (distinguishing between "individual rights" and "mere political act[s] belonging to the executive department alone"); 10 Annals of Cong. 606, 613 (1800) (explaining that "[a] case in law or equity proper for judicial decision may arise under a treaty, where the rights of individuals acquired or secured by a treaty are to be asserted or defended in court" but that the judicial power does not extend to "questions of political law, proper to decided, by the Executive, and not by the courts" (Rep. John Marshall)).

Article III "enables the judicial department to receive jurisdiction to the full extent of the constitution, laws, and treaties of the United States, when the subject is submitted to it by a party who asserts his rights in the form prescribed by law. It then becomes a case, and the constitution declares, that the judicial power shall extend to all cases arising under the constitution, laws, and treaties of the United States." *Osborn*, 22 U.S. (9 Wheat.) at 819; Story, *supra*, at 507 (explaining that an Article III question "arises, when some subject, touching the constitution, laws, or treaties of the United States, is submitted to the courts by a party, who asserts his rights in the form prescribed by law"); *see also Weston v. City Council of Charleston*, 27 U.S. (2 Pet.) 449, 464 (1829) (explain-

ing that the term "suit" is "a very comprehensive one, and is understood to apply to any proceeding in a court of justice, by which an individual pursues that remedy in a court of justice, which the law affords him. [I]f a right is litigated between parties in a court of justice, the proceeding by which the decision of the court is sought, is a suit."); *Cohens*, 19 U.S. at 379 ("A case in law or equity consists of the right of the one party, as well as of the other").

The Framing-era formulation of an Article III case recognized the broad power of Congress to create individual rights and prescribe judicial remedies for their violation, while ensuring that courts did not interfere with matters committed to other branches of government. *See, e.g.*, 10 Annals of Cong. 606 (explaining that Article III requires "a question" to "assume a legal form for forensic litigation and judicial decision" and that its grant of judicial power was not designed "to confer on that department any political power whatever"). Beginning with the First Congress, our nation's elected representatives created individual rights and prescribed judicial remedies for their violation, including provisions for statutory damages akin to those contained in the FCRA.

In 1790, the First Congress enacted the nation's first copyright law, providing that the "author and authors of any map, chart, book or books shall have the sole right and liberty of printing, reprinting, publishing and vending such map, chart, book or books" and that "every such offender and offenders shall also forfeit and pay the sum of fifty cents for every sheet which shall be found in his or their possession, either printed or printing, published, imported or exposed to sale, contrary to the true intent and meaning of this act " Copyright Act of 1790, ch. 15, §§1, 2, 1 Stat. 124, 125; *see also Feltner v. Colum-*

bia Pictures Television, Inc., 523 U.S. 340, 351 (1998) (discussing the 1790 Act). In enacting this per-sheet statutory damages formula, the Copyright Act of 1790 drew on a number of colonial-era copyright laws enacted by the states, which provided a statutory damages range or a per-sheet fixed amount of damages. *See* Francine Crawford, *Pre-Constitutional Copyright Statutes*, 23 Bull. Copyright Soc'y 11, 31-33 (1975); *Feltner*, 523 U.S. at 350-51. While the 1790 Act also contained provisions that allowed an author whose manuscript was published without consent to bring an action for "all damages occasioned by such injury," Copyright Act of 1790 § 6, the Act's statutory damages provision authorized the federal court to award damages based on the copyright violation alone. *See also* Resp't Br. at 22-23 (discussing Copyright Act of 1790).

Likewise, the Second Congress enacted the Patent Act of 1793, providing for an award of treble damages for a violation of an individual's patent rights. Patent Act of 1793, ch. 11, § 5, 1 Stat. 318, 322. Consistent with the common law principles spelled out in *Ashby* and other cases, federal courts held that even if actual damages could not be proven, nominal damages could be recovered under the Patent Act based on a violation of the individual right alone. As Justice Story explained, "where the law gives an action for a particular act, the doing of that act imports of itself a damage to the party. Every violation of a right imports some damage, and if none other be proved, the law allows a nominal damage." *Whittemore v. Cutter*, 29 F. Cas. 1120, 1121 (C.C.D. Mass. 1813).

Spokeo complains about the judicial remedies contained in the Fair Credit Reporting Act, raising the specter of private plaintiffs and their counsel

roaming the country "in the hopes of obtaining a bounty." Pet'r Br. at 38. But what Spokeo calls a bounty is simply the long-recognized fact that, under the Act, actions for damages can go forward based on the violation of a legal right alone.[2] That is entirely in keeping with Article III's guarantee of broad access to the courts to maintain the rule of law. Where, as here, a plaintiff seeks to recover statutory damages for a violation of his federally-protected rights "in the form prescribed by law," *Osborn*, 22 U.S. at 819, there is plainly a case under Article III. No different from suits seeking statutory damages under the Copyright Act of 1790, Robins's suit for damages is a case within the meaning of the Constitution. Spokeo's argument to the contrary would deprive Congress and the federal courts of roles assigned to them in our Constitution, roles that they have played since the Founding.

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[2] Moreover, the fact that a statute provides such a bounty is no basis to invalidate it. Informer statutes, which authorize courts to award cash bounties to plaintiffs for bringing suit to redress legal wrongs, have been a part of the American law since the birth of the nation. As this Court has recognized, "immediately after the framing, the First Congress enacted a considerable number of informer statutes. . . . [S]ome of them provided both a bounty and an express cause of action; others provided a bounty only." *Stevens*, 529 U.S. at 776-77 (footnotes omitted); *Marvin v. Trout*, 199 U.S. 212, 225 (1905) (recognizing that "[s]tatutes providing for actions by a common informer, who himself had no interest whatever in the controversy other than that given by statute, have been in existence . . . ever since the foundation of our government"). Spokeo's argument fails on its own terms.

IV. SUPREME COURT PRECEDENT AFFIRMS THE BROAD POWER OF CONGRESS TO PRESCRIBE JUDICIAL REMEDIES FOR VIOLATION OF FEDERALLY-PROTECTED INDIVIDUAL RIGHTS.

Consistent with the text and history of Article III, this Court has long held that Congress has broad authority to grant standing to sue to aggrieved individuals to redress violations of federal rights, recognizing that "[w]henever the law provides a remedy enforceable in the courts according to the regular course of legal procedure, and that remedy is pursued, there arises a case within the meaning of the Constitution." *Tutun v. United States*, 270 U.S. 568, 577 (1926). In a line of cases, this Court has upheld the constitutionality of statutes that, like the FCRA, ensure access to the courts and enable individuals to vindicate their federal rights. In *Oklahoma v. United States Civil Service Commission*, for example, this Court recognized that "Congress may create legally enforceable rights where none before existed. Violation of such a statutory right normally creates a justiciable cause of action " 330 U.S. 127, 136 (1947); *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 580 (1992) (Kennedy, J., concurring) ("Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before."); *Massachusetts v. EPA*, 549 U.S. 497, 516 (2007) (observing that congressional "authorization" of suit "is of critical importance to the standing inquiry").

Consistent with this precedent, this Court has time and again held that Congress may create individual rights, allow individuals to sue in federal court to vindicate them, and prescribe judicial remedies for their violation, thereby "elevating to the status of le-

gally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law." *Lujan*, 504 U.S. at 578; *Warth v. Seldin*, 422 U.S. 490, 500 (1975) ("The injury required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing .'" (quoting *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973))); *see, e.g.*, *Hardin v. Kentucky Utils. Co.*, 390 U.S. 1, 5-7 (1968) (individual right to be free from competition under the TVA established standing even without an explicit statutory provision conferring right to sue); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373-74 (1982) (upholding statutory standing to sue to redress violations of the right to truthful housing information protected by Fair Housing Act); *FEC v. Akins*, 524 U.S. 11, 20-22 (1998) (upholding statutory standing to sue to redress violations of the right to obtain information concerning campaign financing protected by the Fair Election Campaign Act).

This case is on all fours with *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), in which this Court upheld Congress's broad grant of standing contained in the Fair Housing Act, allowing suits by individuals for damages to redress misrepresentations concerning the availability of housing to proceed. In *Havens*, the plaintiff had no "intention of buying or renting a home," *Havens Realty Corp.*, 455 U.S. at 374, but that fact was irrelevant to the question whether he had standing to sue for the misrepresentation.

Havens held that injury-in-fact was established by the violation of a legal right, observing that "[a] tester who has been the object of a misrepresentation made unlawful under [the Fair Housing Act] has suffered injury in precisely the form the statute was intended to guard against" and "has standing to maintain a claim for damages under the Act's provisions."

Id. at 373, 374; *see also Akins*, 524 U.S. at 22 (concluding that there was Article III injury based on violation of "a statute which . does seek to protect individuals such as respondents from the kind of harm they say they have suffered"). The violation of the plaintiff's "legal right to truthful information about available housing," *Havens Realty Corp.*, 455 U.S. at 373, established the "simple fact of injury" required to satisfy Article III's case or controversy limitation. *Id.* at 374. Spokeo, not surprisingly, turns a blind eye to this aspect of *Havens*.

Like the damages claim for misrepresenting the availability of housing in *Havens*, Robins's suit here satisfies all the prerequisites for an Article III case. As alleged in the complaint, Spokeo's dissemination of false information about Robins was a "concrete and particularized" "invasion of a legally protected interest," *Lujan*, 504 U.S. at 560, that harmed his employment prospects. *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386 (2014) (allegations of lost sales and harm to business reputations constituted injury-in-fact). As in *Havens*, Robins "has suffered injury in precisely the form the statute was intended to guard against," *Havens Realty Corp.*, 455 U.S. at 373; that injury was caused by Spokeo, not some other third party, and that injury can be remedied by an award of damages. To say Robins's suit is not a "case" as that word is used in the Constitution is to distort Article III's plain terms beyond recognition.

Spokeo's argument that permitting this case to go forward will eviscerate Article III's standing requirements is also unfounded. While Congress has very broad authority to provide aggrieved individuals a right to sue and to prescribe judicial remedies for violation of federal law, there are also clear limits on

that authority. This Court has held that Congress cannot provide all citizens a right to sue "to vindicate the public's nonconcrete interest in the proper administration of the laws," *Lujan*, 504 U.S. at 581 (Kennedy, J., concurring), concluding that permitting such generalized grievances to be aired in court would intrude too deeply on the executive's enforcement discretion, and thus raise separation of powers concerns. *See Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009) (denying standing to challenge federal regulations that "govern only the conduct of Forest Service officials engaged in project planning"); *Lujan*, 504 U.S. at 577 (denying Congress the authority make "the undifferentiated public interest in executive officers' compliance with the law vindicable in the courts").

These concerns, however, are entirely absent when Congress provides individuals a right to sue private businesses for damages for concrete violations of individual rights. Private claims against private actors sounding in tort, like those provided in the FCRA, have traditionally been adjudicated by the judicial branch. *See Summers*, 555 U.S. at 492 (discussing the "traditional role of Anglo-American courts, which is to redress or prevent . . injury to persons caused by private or official violation of law"); Hessick, *supra*, at 319 ("The core duty of the judiciary is to remedy private legal wrongs by awarding relief when there has been a violation of a private right."). Congress's power to create judicial remedies is at its apex, where, as here, it enacts a damages remedy that supplements common law protections to redress private legal wrongs. Spokeo's argument that Congress has violated separation of powers principles in conferring a right to sue here blithely ignores that

this case arises at the core of the judicial power conferred by Article III.

* * *

In enacting the FCRA, Congress created a set of rights and remedies with deep roots in the common law, expanding on well-established common-law protections in order to protect consumers from the dissemination of inaccurate personal information. *See Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 763 (1989) (noting "common law" protections that protect "the individual's control of information concerning his or her person"). In establishing a statutory damages remedy that allows courts to award damages for the violation of a legal right, Congress followed in the footsteps of the First Congress, which enacted a similar legal regime to redress violations of federal copyright protections. The fact that Congress incorporated these historic principles in enacting FCRA answers the Article III question posed in this case. Robins's suit for damages for violation of his individual rights secured by the FCRA is plainly "'in a form historically viewed as capable of resolution through the judicial process.'" *Massachusetts*, 549 U.S. at 516 (quoting *Flast v. Cohen*, 392 U.S. 83, 95 (1968)). Robins is entitled to his day in court.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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REPLY BRIEF

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In The
Supreme Court of the United States

SPOKEO, INC.,

Petitioner,

v.

THOMAS ROBINS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Respondent.

On Writ Of *Certiorari* To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICUS CURIAE* CONSUMER DATA INDUSTRY ASSOCIATION IN SUPPORT OF PETITIONER

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RULE 29.6 STATEMENT

Pursuant to Rule 29.6, the Consumer Data Industry Association ("CDIA") provides the following disclosure.

CDIA is a trade association. No publicly held company owns 10% or more of CDIA stock.

TABLE OF CONTENTS

Page

RULE 29.6 STATEMENT i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

INTEREST OF *AMICUS CURIAE* 1

THE CONSUMER REPORTING INDUSTRY 4

SUMMARY OF THE ARGUMENT 6

ARGUMENT 8

I. THE NINTH CIRCUIT ERRED IN PERMITTING A PRIVATE RIGHT OF ACTION BASED ON A BARE VIOLATION OF A FEDERAL STATUTE 8

A. Article III of the Constitution requires an actual case or controversy 9

B. Circuit court cases holding that a violation of a statutory right is an injury-in-fact have confused an injury-in-law with an injury-in-fact 10

C. This Court's decisions do not allow a bare statutory violation to establish standing 14

D. The appropriate way to remedy harmless violations of the FCRA is through administrative enforcement 16

TABLE OF CONTENTS – Continued

Page

II. THE FCRA IS A COMPLEX, HIGHLY-TECHNICAL STATUTE, AND ALLOWING SUITS UNDER THE FCRA TO PROCEED IN THE ABSENCE OF INJURY-IN-FACT WOULD CREATE ABSURD RESULTS 17

III. THE NINTH CIRCUIT'S DECISION THREATENS CDIA'S MEMBERS WITH CRUSHING LIABILITY THROUGH UN-CHECKED CLASS ACTION LITIGATION.... 22

CONCLUSION..... 25

TABLE OF AUTHORITIES

Page

CASES

Amchem Prod., Inc. v. Windsor, 521 U.S. 591 (1997) 23

Andrews v. Trans Union Corp., 7 F. Supp. 2d 1056 (C.D. Cal. 1998) 20

Andrews v. TRW Inc., 225 F.3d 1063 (9th Cir. 2000) 20

Ariz. Christian Sch. Tuition Org. v. Winn, 131 S. Ct. 1436 (2011) 9, 10

AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011) 24

Beaudry v. TeleCheck Servs., Inc., 579 F.3d 702 (6th Cir. 2009) 11

City of L.A. v. Lyons, 461 U.S. 95 (1983) 9

Edwards v. First Am. Fin. Corp., 610 F.3d 514 (9th Cir. 2010) 8

Farmer v. Phillips Agency, Inc., 285 F.R.D. 688 (N.D. Ill. 2012) 20

First Am. Fin. Corp. v. Edwards, 132 S. Ct. 2536 (2012) 8

Gillespie v. Equifax Info. Serv., LLC, 2006 WL 681059 (N.D. Ill. March 9, 2006) 21

Gillespie v. Equifax Info. Serv., LLC, 484 F.3d 938 (7th Cir. 2007) 21

Gillespie v. Trans Union, LLC, 433 F. Supp. 2d 908 (N.D. Ill. 2006) 20

TABLE OF AUTHORITIES – Continued

Page

Gladstone, Realtors v. Vill. of Bellwood, 441 U.S. 91 (1979) 14

Hammer v. Sam's East, Inc., 754 F.3d 492 (8th Cir. 2014) 12, 13, 14, 22

Harris v. Database Mgmt. & Mktg., Inc., 609 F. Supp. 2d 509 (D. Md. 2009) 20

Heckler v. Chaney, 470 U.S. 821 (1985) 16, 17

Kennedy v. Chase Manhattan Bank USA, NA, 369 F.3d 833 (5th Cir. 2004) 20

Linda R.S. v. Richard D., 410 U.S. 614 (1973) 10

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) 9, 10, 14, 24

Mass. v. EPA, 549 U.S. 497 (2007) 10

Middlebrooks v. Retail Credit Co., 416 F. Supp. 1013 (N.D. Ga. 1976) 20

Murray v. GMAC Mortg. Corp., 434 F.3d 948 (7th Cir. 2006) 11, 12, 23

Raines v. Byrd, 521 U.S. 811 (1997) 14

Robins v. Spokeo, 742 F.3d 409 (9th Cir. 2014) 8, 11, 12, 16

Safeco Ins. Co. of Am. v. Burr, 551 U.S. 47 (2007) 17, 20

Sarver v. Experian Info. Solutions, 390 F.3d 969 (7th Cir. 2004) 2, 3, 5

Sierra Club v. Morton, 405 U.S. 727 (1972) 10

TABLE OF AUTHORITIES – Continued

Page

Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26 (1976) 10

Summers v. Earth Island Inst., 555 U.S. 488 (2009) 8, 14

TRW Inc. v. Andrews, 534 U.S. 19 (2001) 4, 5

U.S. v. Richardson, 418 U.S. 166 (1974) 9

Villagran v. Freeway Ford, Ltd., 525 F. Supp. 2d 819 (S.D. Tex. 2007) 20

Vt. Agency of Natural Res. v. U.S. ex rel. Stevens, 529 U.S. 765 (2000) 15, 16

Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011) 23

Wantz v. Experian Info. Solutions, 386 F.3d 829 (7th Cir. 2004) 20

Warth v. Seldin, 422 U.S. 490 (1975) 10, 14

Washington v. CSC Credit Serv. Inc., 199 F.3d 263 (5th Cir. 2000) 19, 20, 21

Whitmore v. Ark., 495 U.S. 149 (1990) 10

CONSTITUTIONAL PROVISIONS

Article III ..... *passim*

STATUTES AND REGULATIONS

15 U.S.C. § 1681a ..... *passim*

15 U.S.C. § 1681(a)(1) 4

TABLE OF AUTHORITIES – Continued

Page

15 U.S.C. § 1681(a)(2) 4
15 U.S.C. § 1681b(a) 5
15 U.S.C. § 1681c(g) 12
15 U.S.C. § 1681e(a) 18, 19, 21
15 U.S.C. § 1681e(b) 18
15 U.S.C. § 1681g(c)(1)(B)(iv) 21
15 U.S.C. § 1681i(a)(1)(A) 18
15 U.S.C. § 1681i(a)(5)(C) 18
15 U.S.C. § 1681n 11, 20, 22, 24
15 U.S.C. § 1681n(a)(1)(A) 2
15 U.S.C. § 1681o 20
15 U.S.C. § 1681s 16
15 U.S.C. § 1681s-1 21
15 U.S.C. § 1681s-2(a)(6)(A) 18
Fed. R. Civ. P. 23 23

OTHER AUTHORITIES

Brief for Petitioner, *Spokeo, Inc. v. Robins*, No. 13-1339 (U.S. July 2, 2015) 11, 16

Consumer Financial Protection Bureau, *Key Dimensions and Processes in the U.S. Credit Reporting System* (Dec. 2012), *available at* http://files.consumerfinance.gov/f/201212_cfpb_credit-reporting-white-paper.pdf 2, 3, 17, 22

TABLE OF AUTHORITIES – Continued

Page

Federal Trade Commission, *Report to Congress Under Sections 318 and 319 of the Fair and Accurate Credit Transactions Act of 2003* (2004), *available at* http://www.ftc.gov/reports/facta/041209factarpt.pdf 3, 5

Michael E. Staten and Fred H. Cate, *The Impact of National Credit Reporting Under the Fair Credit Reporting Act: The Risk of New Restrictions and State Regulation* (Credit Research Center, Working Paper No. 67, 2003), *available at* http://faculty.msb.edu/prog/CRC/pdf/WP67.pdf 2, 5

INTEREST OF *AMICUS CURIAE*

With the consent of all parties,[1] *amicus curiae*, the Consumer Data Industry Association ("CDIA"), submits its brief in support of petitioner, Spokeo, Inc. (*hereinafter*, "Spokeo").

CDIA is an international trade association, founded in 1906, and headquartered in Washington, D.C. As part of its mission to support companies offering consumer information reporting services, CDIA establishes industry standards, provides business and professional education for its members, and produces educational materials for consumers describing consumer credit rights and the role of consumer reporting agencies ("CRAs") in the marketplace. CDIA is the largest trade association of its kind in the world, with a membership of over 140 consumer credit and other specialized CRAs operating throughout the United States and the world.

In its more than 100-year history, CDIA has worked with the United States Congress and state

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[1] All parties have consented to the filing of CDIA's *amicus* brief, in accordance with Rule 37.3(a). CDIA's correspondence requesting consent and the parties' responses have been filed with the Clerk of Court.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

legislatures to develop laws and regulations governing the collection, use, maintenance, and dissemination of consumer report information. In this role, CDIA participated in the legislative efforts that led to the enactment of the Fair Credit Reporting Act ("FCRA") in 1970 and its subsequent amendments.

CDIA is vitally interested in the outcome of this appeal because CDIA's CRA members are subject to the FCRA's comprehensive regulatory scheme and its statutory damages provision, which permits consumers to recover "any actual damages sustained by the consumer as a result of [a willful violation] *or damages of not less than $100 and not more than $1,000*" from those who have willfully failed to comply with the FCRA "with respect to" such consumers.[2]

Because, in the electronic age, any CRA business practice is likely to be repeated millions of times each year (perhaps even millions of times each day),[3] the

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[2] 15 U.S.C. § 1681n(a)(1)(A) (emphasis added).

[3] *See, e.g.*, Consumer Financial Protection Bureau, *Key Dimensions and Processes in the U.S. Credit Reporting System* (*hereinafter "Key Dimensions"*) at 3 (noting that the three national CRAs "each maintain credit files on over 200,000,000 adults and receive information from approximately 10,000 furnishers of data") (Dec. 2012), *available at* http://files.consumerfinance.gov/f/201212_cfpb_credit-reporting-white-paper.pdf; *see also Sarver v. Experian Info. Solutions*, 390 F.3d 969, 972 (7th Cir. 2004) (noting that one CRA "processes over 50 million updates to trade information each day"); Michael E. Staten and Fred H. Cate, *The Impact of National Credit Reporting Under the Fair Credit Reporting Act: The Risk of New Restrictions and State Regulation* at 28 (Credit Research Center,

(Continued on following page)

Article III standing requirements, particularly the injury-in-fact requirement, are critical to CRAs whose activities can be said to be, in the FCRA's language (15 U.S.C. § 1681a) "with respect to" almost any adult U.S. consumer. Article III's limitations are essential to prevent entrepreneurial plaintiffs' class action counsel from abusing the FCRA's statutory damages provision to challenge any CRA activity as a willful violation even when the activity results in no cognizable consumer injury.

Moreover, because the FCRA imposes compliance obligations upon tens of thousands of businesses who furnish or provide information to CRAs,[4] and the users (*e.g.*, creditors, insurers, employers, landlords, and law enforcement) of the billions of consumer reports CRAs prepare every year,[5] the risk of no-injury

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Working Paper No. 67, 2003) (the credit reporting system "deals in huge volumes of data – over 2 billion trade line updates, 2 million public record items, an average of 1.2 million household address changes a month, and over 200 million individual credit files."), *available at* http://faculty.msb.edu/prog/CRC/pdf/WP67.pdf.

[4] *See, e.g.*, *Sarver*, 390 F.3d at 972 (noting that a single CRA "gathers information originated by approximately 40,000 sources").

[5] Federal Trade Commission, *Report to Congress Under Sections 318 and 319 of the Fair and Accurate Credit Transactions Act of 2003* at 8-9 (2004) (more than 1.5 billion consumer reports furnished annually), *available at* http://www.ftc.gov/reports/facta/041209factarpt.pdf; *see also Key Dimensions*, *supra* note 3, at 3 ("On a monthly basis, . . furnishers provide information on over 1.3 billion credit accounts or other 'trade lines' ").

class action lawsuits, such as Robins's putative class action, could threaten nearly every aspect of the U.S. economy.

Because CDIA has represented the consumer reporting industry for more than a century, and because its member CRAs and their furnishers and users are all subject to potential claims under the FCRA's statutory damages provision, CDIA is uniquely qualified to assist this Court as it considers Spokeo's case.

THE CONSUMER REPORTING INDUSTRY

In enacting the FCRA, Congress recognized that the consumer reporting industry is vital to the U.S. economy.[6] Each year, CRAs furnish more than 1.5 billion consumer reports to creditors, insurers, employers, landlords, law enforcement and counter-terrorist agencies, all of which use this information to make important risk-based decisions, hire employees, evaluate the backgrounds of potential tenants, and provide information to law enforcement to locate

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[6] 15 U.S.C. § 1681(a)(1) ("The banking system is dependent upon fair and accurate credit reporting."); 15 U.S.C. § 1681(a)(2) (the consumer reporting system is an "elaborate mechanism" for investigating and evaluating a consumer's credit worthiness, credit standing, credit capacity, character, and general reputation); *TRW Inc. v. Andrews*, 534 U.S. 19, 23 (2001) ("Congress enacted the FCRA in 1970 to promote efficiency in the Nation's banking system and to protect consumer privacy.").

individuals suspected of criminal activity.[7] Information in consumer reports contributes to the soundness, safety and efficiency of the insurance, banking, finance, retail credit, housing, and law enforcement systems in the United States.

In order to prepare these reports, CRAs have created and maintain data files on nearly 200 million consumers.[8] The files contain 2.6 billion tradelines (an industry term for accounts that are included in a credit report)[9] that include billions of items of information the CRAs receive from over ten thousand furnishers on a monthly basis.[10] Because credit reports are compiled over the course of years, based on information obtained from different types of furnishers, and updated on a periodic basis, insurers, creditors, landlords, employers and others who have "permissible purposes"[11] can obtain a detailed picture of the risk (*e.g.*, default risk, risk of a covered loss, etc.) presented by a particular consumer.

The U.S. consumer reporting system evolved and operates on a purely voluntary basis. There is no

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[7] *TRW*, 534 U.S. at 23; *Sarver v. Experian Info. Solutions*, 390 F.3d 969, 972 (7th Cir. 2004); *see* Staten and Cate, *supra* note 3, at iv.

[8] Federal Trade Commission, *Report to Congress Under Sections 318 and 319 of the Fair and Accurate Credit Transactions Act of 2003*, *supra* note 5, at 8-9.

[9] *Id.* at 8-9.

[10] *Id.*

[11] 15 U.S.C. § 1681b(a).

legal requirement that any entity furnish information to a consumer reporting agency. If the providers of consumer reports and the furnishers of consumer report information must face company-crippling liability for technical issues that result in no consumer harm, there will be little incentive to participate in the consumer reporting process. If consumer reports become less complete and, consequently, less accurate, they will be less predictive of risk. The result will be increased transaction costs whenever a creditor or insurer makes a risk determination, and thus increased costs to the consumer.

SUMMARY OF THE ARGUMENT

Left uncorrected, the Ninth Circuit's decision disrupts long-held rules that govern standing and ensure the Article III courts address only true cases or controversies as required by the Constitution. This Court has held repeatedly that Article III standing requires three elements: (1) a concrete injury, (2) that is caused by the defendant's actions, and (3) that is redressable by the Courts. According to the Ninth Circuit, the tripartite test may now be collapsed into one question in circumstances where Congress has granted plaintiffs the ability to seek statutory damages, as in a case brought under the FCRA. While this Court has recognized that Congress may create enforceable rights that did not previously exist, this Court has never held that Congress may dispose of

the requirement that the plaintiff suffer a distinct, palpable injury.

The Ninth Circuit's decision disregards the unique complexity of the FCRA and the industry it regulates. The FCRA imposes a number of technical burdens on CRAs, the violation of which could conceivably lead to no consumer harm. And, in many instances, a violation of a highly technical provision of the FCRA could result in a *benefit* to the consumer. Following the Ninth Circuit's holding and allowing private rights of action for such violations, in the absence of any consumer harm, is a recipe for absurd results.

The Ninth Circuit's decision places CDIA's members at great risk. Virtually all aspects of the data that CRAs provide to their customers relate to activities with respect to consumers. Granting consumers standing to sue without any allegation of injury-in-fact would open the door to ruinous damages to CDIA's members through unchecked class action litigation based upon minor technical issues that automatically repeat across millions of consumers and potentially billions of tradelines. The effects would reverberate throughout the broader economy, which depends heavily on the availability and accuracy of information concerning consumer creditworthiness.

To confirm that Congress may not abrogate by legislative fiat the U.S. Constitution's minimum requirements for judicial standing, this Court should

reverse the court of appeals' decision to make clear that actual injury remains part of the "hard floor of Article III jurisdiction that cannot be removed by statute[s]."[12]

ARGUMENT

I. THE NINTH CIRCUIT ERRED IN PERMITTING A PRIVATE RIGHT OF ACTION BASED ON A BARE VIOLATION OF A FEDERAL STATUTE.

In determining that Robins had standing to pursue his class action lawsuit against Spokeo, the Ninth Circuit erred by holding that Congress may create standing for plaintiffs who suffer no actual injury and seek to recover solely through a statutory damages remedy.[13] This holding represents an unwarranted and unprecedented expansion of standing in violation of Article III of the Constitution.

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[12] *Summers v. Earth Island Inst.*, 555 U.S. 488, 497 (2009).

[13] *Robins v. Spokeo*, 742 F.3d 409, 414 (9th Cir. 2014). This case arises in the same context as *First Am. Fin. Corp. v. Edwards*, 132 S. Ct. 2536 (2012) (cert. dismissed as improvidently granted). However, this case differs from *Edwards* in that Robins has not alleged that he paid any money to Spokeo. Since *Edwards* was a RESPA case, the plaintiffs' claims arose from the payment of settlement fees. *Edwards v. First Am. Fin. Corp.*, 610 F.3d 514, 516 (9th Cir. 2010). This case presents no such difficulty.

A. Article III of the Constitution requires an actual case or controversy.

This Court's rules for standing are well-established. "[T]hose who seek to invoke the jurisdiction of the federal courts must satisfy the threshold requirement imposed by Article III of the Constitution by alleging an actual case or controversy."[14] "One of those landmarks, setting apart the 'Cases' and 'Controversies' that are of the justiciable sort referred to in Article III – serving to identify those disputes which are appropriately resolved through the judicial process – is the doctrine of standing."[15] "For the federal courts to decide questions of law arising outside of cases and controversies would be inimical to the Constitution's democratic character. And the resulting conflict between the judicial and the political branches would not, 'in the long run, be beneficial to either.'"[16]

This Court has consistently held that the "irreducible constitutional minimum of standing" consists of three elements: (1) an injury-in-fact, that (2) is caused by the challenged action of the defendant, and that (3) is redressable in some way by a favorable

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[14] *City of L.A. v. Lyons*, 461 U.S. 95, 101 (1983).

[15] *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (internal citations omitted).

[16] *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1442 (2011) (quoting *U.S. v. Richardson*, 418 U.S. 166 (1974)).

decision.[17] In requiring a particular injury, this Court has emphasized "that the injury must affect the plaintiff in a personal and individual way."[18]

B. Circuit court cases holding that a violation of a statutory right is an injury-in-fact have confused an injury-in-law with an injury-in-fact.

To be sure, Congress may in some circumstances recognize new rights, with the result that an invasion of those rights causes injury and, therefore, permits standing. "[T]he injury required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing.'"[19] Nonetheless, "Art. III's requirement remains: the plaintiff *must still allege a distinct and palpable injury to himself.*"[20]

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[17] *Lujan*, 504 U.S. at 560 (citing *Warth v. Seldin*, 422 U.S. 490, 508 (1975); *Sierra Club v. Morton*, 405 U.S. 727, 740-741, n. 16 (1972); *Whitmore v. Ark.*, 495 U.S. 149, 155 (1990); *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976)).

[18] *Ariz. Christian Sch.*, 131 S. Ct. 1442 (quoting *Lujan*, 504 U.S. at 560, n. 1).

[19] *Lujan*, 504 U.S. 579 (citing *Warth v. Seldin*, 422 U.S. 490, 500 (1975), quoting *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n. 3 (1973)); *see also Mass. v. EPA*, 549 U.S. 497, 516 (2007) ("In exercising this power, however, Congress must at the very least identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit.") (quoting *Lujan*, 504 U.S. at 581 (Kennedy, J., concurring)).

[20] *Warth*, 422 U.S. at 501 (emphasis added).

The Ninth Circuit's *Spokeo* decision ignores this fundamental rule, holding that a mere statutory violation is "injury" enough, "when the statutory cause of action does not require proof of actual damages."[21] Thus, because Congress authorized "damages of not less than $100 and not more than $1,000" against "[a]ny person who willfully fails to comply with"[22] the FCRA, the Ninth Circuit held that Robins had sustained the requisite "injury" because he alleged willful violations of the FCRA.[23]

The Ninth Circuit purported to follow the lead of two other courts of appeals that concluded that section 1681n authorizes a cause of action for statutory damages without the need to show any actual injury.[24] In *Beaudry v. TeleCheck Services, Incorporated*, the Sixth Circuit concluded that, in section 1681n, Congress created a "new legal right," including the right to sue when "the only injury-in-fact involves the violation of that statutory right."[25] Similarly, but in a more attenuated connection to the Ninth Circuit's holding in *Spokeo*, the Seventh Circuit

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[21] 742 F.3d 409, 413 (9th Cir. 2014).

[22] 15 U.S.C. § 1681n.

[23] 742 F.3d at 413. As demonstrated by Spokeo in Petitioner's Brief, there was no invasion of Robins's legal right, nor did Robins suffer an injury-in-fact. Brief for Petitioner at 36-40, *Spokeo, Inc. v. Robins*, No. 13-1339 (U.S. July 2, 2015).

[24] *See, e.g.*, *Beaudry v. TeleCheck Servs., Inc.*, 579 F.3d 702 (6th Cir. 2009); *Murray v. GMAC Mortg. Corp.*, 434 F.3d 948 (7th Cir. 2006).

[25] *Beaudry*, 579 F.3d at 705.

in *Murray v. GMAC Mortgage Corporation*, stated that the FCRA "provide[s] for modest damages without proof of injury."[26] However, the Seventh Circuit couched this statement in a discussion where it also noted that individual losses would be "small and hard to quantify" and did so without reference to Article III requirements.[27] Regardless of what the court in *Murray* meant, the Ninth Circuit's *Spokeo* holding builds upon prior decisions from the Sixth and Seventh Circuits that appear to suffer from the same infirmity. Spokeo transforms the existence of a remedy (*i.e.*, statutory damages) into the existence of a remedial case or controversy.

After the Ninth Circuit's *Spokeo* decision, the Eighth Circuit similarly dispensed with the requirement for injury-in-fact, holding that a defendant retail store's violation of the FCRA's requirement to truncate account numbers on receipts was sufficient to confer standing.[28] The court reasoned that the FCRA created "the legal right to obtain a receipt at the point of sale showing no more than the last five digits of the consumer's credit or debit card number"

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[26] *Murray*, 434 F.3d at 953.

[27] *Id.*

[28] *Hammer v. Sam's East, Inc.*, 754 F.3d 492, 498-499 (8th Cir. 2014). The provision of the FCRA at issue in *Hammer*, 15 U.S.C. § 1681c(g), applies to a "person that accepts credit or debit cards for [a] transaction" and provides an electronically printed receipt. This is the type of technical requirement where an error can be replicated millions of times.

and concluded that a person who provides a receipt without adequate truncation has injured the plaintiff by invading her legal right.

The dissent in *Hammer* properly identified the infirmity in the majority's holding: "the [plaintiffs'] only basis for appearing in federal court is a harmless statutory violation."[29] The dissent noted that it was undisputed that the plaintiffs in the underlying case never alleged that they suffered any concrete harm, such as an actual identity theft or costs incurred to protect themselves from identity theft, as a result of the failure of the stores to truncate their receipts, and that the receipts at issue never left the possession of the plaintiffs.[30] The dissent drew a distinction between an injury-in-law – one created by an invasion of statutory right – and an injury-in-fact – one in which there is actual harm to the plaintiff.[31] As the dissent argued, an injury-in-law

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[29] *Id.* at 504 (Riley, J., dissenting).

[30] "This putative 'identity theft' case contains no trace of actual identity theft. The plaintiffs . . . do not allege the receipts containing their credit card information were ever at risk of exposure to would-be identity thieves. Until this lawsuit, the receipts apparently never left the [plaintiffs'] possessions, and now the receipts are safely ensconced in the sealed record . . . [T]here is no allegation the [plaintiffs] suffered so much as a sleepless night or other psychological harm . . [T]he [plaintiffs] do not even claim to have undertaken costly and burdensome measures to protect themselves from the risk they supposedly face." *Id.* (internal quotation omitted).

[31] *Id.* at 505-506.

without any injury-in-fact is not sufficient for Article III standing.[32]

C. This Court's decisions do not allow a bare statutory violation to establish standing.

This Court's own decisions support the *Hammer* dissent's interpretation of standing and have never allowed bootstrapping to establish a justiciable case or controversy. Even where Congress creates a private right of action, "Art. III's requirement remains: the plaintiff must still allege a distinct and palpable injury to himself, even if it is an injury shared by a large class of other possible litigants."[33] This is because "the requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute."[34] "Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing."[35]

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[32] *Id.* at 507.

[33] *Warth*, 422 U.S. at 499.

[34] *Summers v. Earth Island Inst.*, 555 U.S. 488, 497 (2009); *Lujan*, 504 U.S. at 560 ("[T]he core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III.").

[35] *Raines v. Byrd*, 521 U.S. 811, 820 n. 3 (1997) (citing *Gladstone, Realtors v. Vill. of Bellwood*, 441 U.S. 91, 100 (1979)).

CDIA does not deny that, through the FCRA, Congress granted putative plaintiffs a private right of action, including a private right of action for statutory damages based on willful violations. But Congress' creation of a private right of action (an injury-in-law) does not entitle every member of the public who simply claims there is a violation of the statute access to the federal courts, which requires at the very minimum, an injury-in-fact.

This Court addressed this issue in a related context, noting "[a]n interest unrelated to injury in fact is insufficient to give a plaintiff standing."[36] In *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, this Court considered whether a plaintiff suing under the *qui tam* provision of the False Claims Act had standing to assert his claims because the injury alleged in the suit was suffered by the United States. The plaintiff's only interest in the litigation was the "bounty," in the form of a percentage of the United States' recovery he stood to receive if he prevailed in the litigation. The Court firmly rejected the notion that this interest in the suit's outcome sufficed for standing, comparing the plaintiff's interest to that of "someone who has placed a wager on the outcome."[37]

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[36] *Vt. Agency of Natural Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 772 (2000).

[37] *Id.*

The *Spokeo* decision would permit what this Court rejected in *Vermont Agency*: "wagering" on the outcome of class action litigation by plaintiffs who have suffered no actual injury.[38]

D. The appropriate way to remedy harmless violations of the FCRA is through administrative enforcement.

That Robins lacks standing does not mean that the alleged violations are not subject to any other type of oversight or enforcement. The FCRA provides for its administrative enforcement by the Federal Trade Commission, the Consumer Financial Protection Bureau, the federal banking agencies, and state Attorneys General.[39] Each of these enforcement authorities may vindicate the public interest in seeing that the FCRA's provisions are obeyed. Even when no individual has been injured, governmental authorities charged with enforcement of the law always have an interest in seeing that the laws are obeyed.[40] This Court has acknowledged the "peculiar

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[38] Brief for Petitioner, *supra* note 23, at 47-49.

[39] 15 U.S.C. § 1681s.

[40] *Heckler v. Chaney*, 470 U.S. 821, 831-832 (1985) ("[A]n agency decision . . . often involves a complicated balancing of a number of factors which are peculiarly within its expertise. . . . Thus, the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the

(Continued on following page)

expertise" of administrative agencies which Congress has tasked with carrying out the mandates of particular statutes.[41] CDIA submits that administrative enforcement actions advance statutory purposes without exceeding the courts' traditional and proper Article III role of vindicating individual rights and remedying individual injuries.

II. THE FCRA IS A COMPLEX, HIGHLY-TECHNICAL STATUTE, AND ALLOWING SUITS UNDER THE FCRA TO PROCEED IN THE ABSENCE OF INJURY-IN-FACT WOULD CREATE ABSURD RESULTS.

To govern the complex consumer reporting industry, the FCRA was first enacted in 1970. Congress has amended the FCRA a number of times in many significant respects. The FCRA's requirements govern all aspects of credit reporting, an industry that has changed significantly since the statute's original passage.[42] As this Court has observed, the FCRA is in many places a "less-than-pellucid"[43] statute and

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agency has enough resources to undertake the action at all. An agency generally cannot act against each technical violation of the statute it is charged with enforcing. The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities.").

[41] *Id.*

[42] *See Key Dimensions*, *supra* note 3, at 7 (describing the changes to the consumer reporting industry).

[43] *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 70 (2007).

imposes a number of responsibilities on CRAs and others, some highly technical. It contains no fewer than 31 separate sections, 145 subsections, and approximately 34,000 words.

Given the statutory complexity of the FCRA, many courts have rejected attempts to bring suits on the existence of a mere violation of a particular statutory requirement in the absence of harm to the consumer. This is best illustrated by suits based solely on an alleged failure of a CRA to act "reasonably." A number of the provisions of the FCRA require CRAs to maintain reasonable procedures or otherwise act reasonably.[44] When preparing consumer reports, for example, CRAs must "follow reasonable procedures to assure the maximum possible accuracy of the information concerning the individual about whom the report relates."[45] Similarly, a CRA that receives a consumer dispute must "conduct a reasonable reinvestigation to determine whether the disputed information is inaccurate."[46] Under the Ninth Circuit's view, a plaintiff could maintain a cause of action based solely on the absence of reasonable procedures, regardless of whether there was any injury-in-fact to the plaintiff. This is an absurd result that the courts have sought to avoid.

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[44] *See, e.g.*, 15 U.S.C. §§ 1681e(a), 1681i(a)(5)(C), 1681s-2(a)(6)(A), 1681i(a)(1)(A).

[45] 15 U.S.C. § 1681e(b).

[46] 15 U.S.C. § 1681i(a)(1)(A).

The Fifth Circuit's opinion in *Washington v. CSC Credit Services* illustrates this point.[47] Faced with a suit alleging a failure to maintain reasonable procedures under section 1681e(a), the court refused to impose liability where there was no evidence that the alleged failure to maintain such procedures harmed the plaintiffs.[48] The plaintiffs argued that, regardless of whether the disclosure was permissible under the FCRA, they were entitled to relief because the defendants did not have reasonable procedures in place to prevent improper disclosures.[49] Notably, the plaintiffs did not allege that they suffered any harm as a result of the defendant's unreasonable procedures, or that the disclosures at issue were improper under the FCRA. The entire basis for the plaintiffs' claim for damages was that the defendants' *procedures* were inadequate.

The court, in rejecting plaintiffs' claims, explained that the connection between the alleged violation of the FCRA (failure to maintain reasonable procedures) and any alleged damages was too attenuated: "[T]he actionable harm the FCRA envisions is improper disclosure, not the mere *risk* of improper disclosure that arises when 'reasonable procedures' are not followed and disclosures are made."[50] Citing

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[47] *Washington v. CSC Credit Serv. Inc.*, 199 F.3d 263 (5th Cir. 2000).

[48] *Id.* at 267.

[49] *Id.* at 266-267.

[50] *Id.* at 267 (emphasis in original).

Congressional intent, the court explained that "Congress identified actual injuries – including breaches of 'confidentiality and '[im]proper utilization' – which only occur if there is an improper disclosure, suggesting that a general claim of improper procedures is by itself inadequate."[51] In other words, a consumer must suffer *actual injuries* as a result of the improper procedures. Absent resulting harm, a plaintiff has no cause of action for improper procedures. Further, the court refused to accept the plaintiffs' argument that the plain language of the damages provisions of the FCRA (sections 1681o and 1681n) permit damages without any requirement of harm.[52]

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[51] *Id.*

[52] Prior to the Fifth Circuit's decision in *Washington*, at least two district courts had applied the same rule, and refused to find a cause of action where the consumer could only allege that the defendant had insufficient procedures, with no resulting harm. *Andrews v. Trans Union Corp.*, 7 F. Supp. 2d 1056 (C.D. Cal. 1998), *aff'd in part, rev'd in part sub nom. Andrews v. TRW Inc.*, 225 F.3d 1063 (9th Cir. 2000), *rev'd*, 534 U.S. 19 (2001); *Middlebrooks v. Retail Credit Co.*, 416 F. Supp. 1013 (N.D. Ga. 1976). Following *Washington*, courts in a number of circuits adopted the interpretation of actionable harm in *Washington*. *Wantz v. Experian Info. Solutions*, 386 F.3d 829 (7th Cir. 2004), *abrogated by Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47 (2007); *Kennedy v. Chase Manhattan Bank USA, NA*, 369 F.3d 833 (5th Cir. 2004); *Farmer v. Phillips Agency, Inc.*, 285 F.R.D. 688 (N.D. Ill. 2012); *Harris v. Database Mgmt. & Mktg., Inc.*, 609 F. Supp. 2d 509 (D. Md. 2009); *Villagran v. Freeway Ford, Ltd.*, 525 F. Supp. 2d 819, 834 (S.D. Tex. 2007) ("[A] plaintiff must show injury to have standing to assert a claim under the FCRA based on improper disclosure and use of credit information."); *Gillespie v. Trans Union, LLC*, 433 F. Supp. 2d 908 (N.D. Ill.

(Continued on following page)

A review of some of the more technical requirements of the FCRA illustrates the absurdity of deriving standing from a mere violation of the statute. 15 U.S.C. § 1681g(c)(1)(B)(iv), for example, requires that when a CRA provides a consumer with a copy of her file disclosure, the CRA must include a description of the consumer's right to obtain a credit score and a description of how to obtain such a score. If the Court were to allow standing based on a violation of the statute alone, a consumer could bring an action where a CRA failed to provide such a description, but instead provided the consumer with her credit score, a clear benefit to a consumer.

Similarly, the FCRA requires that a CRA include information about certain overdue child support obligations received from state or local child support agencies in a consumer report where the information pre-dates the report by seven years or less.[53] Under the bare violation approach, a consumer would have standing, in the absence of injury-in-fact, where a CRA failed to include his six-year-old overdue child support obligation in a consumer report. Such results – violations based upon mere technical mistakes without any impact on, much less harm to, the consumer –

2006); *Gillespie v. Equifax Info. Serv., LLC*, 2006 WL 681059, at *2 (N.D. Ill. March 9, 2006), *rev'd*, 484 F.3d 938 (7th Cir. 2007) (extending the rule in *Washington* to include section 1681e(a)'s requirement that consumer reporting agencies maintain reasonable procedures to avoid making reports that improperly include obsolete debt).

[53] 15 U.S.C. § 1681s-1.

cannot be what Congress intended when it provided consumers with a right to sue.[54]

To avoid such absurd results, the Court should reverse the court of appeals to make clear that "injury-in-fact" remains part of the essential minimum a plaintiff must allege and demonstrate to have standing.

III. THE NINTH CIRCUIT'S DECISION THREATENS CDIA'S MEMBERS WITH CRUSHING LIABILITY THROUGH UNCHECKED CLASS ACTION LITIGATION.

Affording access to the courts in the absence of injury-in-fact is particularly troubling because CDIA's members and its members' data furnishers and customers will be subject to ruinous damages through class action lawsuits that do not seek to redress any actual consumer harm. CDIA's members' business practices are subject to the FCRA and may involve millions of consumers each day, touching every aspect of the economy.[55] Given their important role in the

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[54] *See* discussion *supra* pp. 13-14. In the *Hammer* case, for instance, the dissent pointed out that there was absolutely no risk of identity theft because the receipts never left the plaintiffs' possession. The dissent noted that there could be no possible injury-in-fact in the absence of even a risk of the result that the FCRA's truncation requirements sought to prevent (identity theft). *Hammer*, 754 F.3d at 504.

[55] *See* 15 U.S.C. § 1681n; *see also Key Dimensions*, *supra* note 3, at 6 ("Of 113 million credit card and retail card accounts, auto loans, personal loans, mortgages, and home equity loans

(Continued on following page)

economy, it is not surprising that consumers sue CDIA's members hundreds of times each year, alleging violations of the FCRA.

Recasting standing as a one-part inquiry (whether there was a violation of the statute) that does not require actual injury removes some of the principal constraints to class certification, namely commonality and predominance.[56] "Commonality requires the plaintiff to demonstrate that the class members have suffered the same injury."[57] Predominance "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation."[58] If the Ninth Circuit's holding were allowed to stand, a class asserting willful violations of the FCRA, but no injury-in-fact, would face little challenge to class certification under the commonality and predominance prongs; the mere existence of a statutory violation, without more, could support an argument that every consumer is a member of a class.[59]

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originated in the United States in 2011, the vast majority of approval decisions used information furnished by credit reporting agencies").

[56] *See* Fed. R. Civ. P. 23.

[57] *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011) (internal quotation marks omitted).

[58] *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 623 (1997).

[59] *Cf. Murray v. GMAC Mortg. Corp.*, 434 F.3d 948, 953 (7th Cir. 2006) (Where consumers must allege individual harm "[c]ommon questions no longer would predominate, and an effort to determine a million consumers' individual losses would make the suit unmanageable.").

Opening the door for no-harm plaintiffs to pursue class actions creates a high risk of *in terrorem* settlements.[60] CDIA's members maintain or furnish credit information on millions of consumers. With statutory damages as much as $1,000 per violation under section 1681n, and no limit on total class recovery, a CRA's potential monetary exposure could reach into the billions, particularly if one computer glitch repeats itself across millions of consumers. This increases the likelihood that CDIA's members will be forced to settle questionable claims out of fear of catastrophic liability.[61]

Further, a plaintiff who seeks to vindicate the violation of a statutory right, and nothing more, becomes a private attorney general, seeking to vindicate an undifferentiated public interest in CRAs' compliance with the FCRA.[62] Article III must have a more concrete limitation. Robins must allege a distinct and palpable injury.

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[60] *See AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752 (2011) ("Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims.").

[61] *Id.*

[62] *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 576-577 (1992) (Congress cannot convert "public interest in proper administration of the laws" into an "'individual right' vindicable in the courts").

CONCLUSION

For the reasons set forth above, the decision of the court of appeals should be reversed.

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REPLY BRIEF

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SPOKEO, INC.,

Petitioner,

v.

THOMAS ROBINS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF DRI – THE VOICE OF THE DEFENSE BAR AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF THE ARGUMENT 3

ARGUMENT 5

A Congressionally-Created Private Right Of Action, Based On A Bare Violation Of A Federal Statute, Does Not Satisfy, Dispose Of, Or Otherwise Lessen A Plaintiff's Obligation To Establish Article III Standing, Including The Existence Of Actual Injury. 5

A. Constitutional standing is an indispensable requirement of any federal suit. 5

B. The mere violation of a statutory right does not satisfy constitutional standing absent a concrete, *de facto* harm. 7

C. Public policy considerations support a reversal. 10

CONCLUSION 14

TABLE OF AUTHORITIES

CASES

Allee v. Medrano,
416 U.S. 802 (1974) 4

Allen v. Wright,
468 U.S. 737 (1984) 4, 5

City of Los Angeles v. Lyons,
461 U.S. 95 (1983) 6

DaimlerChrysler Corp. v. Cuno,
547 U.S. 332 (2006) 10

David v. Alphin,
704 F.3d 327 (4th Cir. 2013) 10

Edwards v. First Am. Corp.,
610 F.3d 514 (9th Cir. 2010) 3, 8

Fair Housing Council of Suburban Philadelphia v. Main Line Times,
141 F.3d 439 (3d Cir. 1998) 9

Friends of the Earth, Inc v. Laidlaw Environmental Services,
528 U.S. 167 (2000) 6, 7

Gambardella v. G. Fox & Co.,
716 F.2d 104 (2d Cir. 1983) 11

Gladstone, Realtors v. Village of Bellwood,
441 U.S. 91 (1979) 7

Hein v. Freedom From Religions Foundation, Inc.,
551 U.S. 587 (2007) 5, 6

Joint Stock Soc'y v. UDV North America,
266 F.3d 164 (3d Cir. 2001) 9

Kendall v. Employees Retirement Plan of Avon Prods.,
561 F.3d 112 (2d Cir. 2009) 9

Loren v. Blue Cross & Blue Shield of Mich.,
505 F.3d 598 (6th Cir. 2007) 7

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992) 4, 6, 8

Matter of Rhone-Poulenc Rorer, Inc.,
51 F.3d 1293 (7th Cir. 1995) 13

Purtle v. Eldridge Auto Sales, Inc.,
91 F.3d 797 (6th Cir. 1996) 11

Raines v. Byrd,
521 U.S. 811 (1997) 7

Robins v. Spokeo, Inc.,
742 F.3d 409 (9th Cir. 2014) 3, 7, 8, 10

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405 U.S. 727 (1972) 4, 9

Summers v. Earth Island Institute,
129 S. Ct. 1142 (2009) 6

Thorogood v. Sears, Roebuck and Co.,
547 F.3d 742 (7th Cir. 2008) 13

Warth v. Seldin,
422 U.S. 490 (1975) 7, 8

CONSTITUTION

U.S. Const. art. III *passim*

U.S. Const. art. III, § 2 5

STATUTES AND RULES

12 U.S.C. § 2607 11

12 U.S.C. § 4907 11

15 U.S.C. § 1051, *et seq.* 9

15 U.S.C. § 1640 11

15 U.S.C. § 1681, *et seq.* 2, 3, 11

15 U.S.C. § 1692 11

15 U.S.C. § 1693m(a)(2) 11

29 U.S.C. § 1854 11

47 U.S.C. § 227(3) 11

Fed. R. Civ. P 23 12

Sup. Ct. R. 37.6 1

Sup. Ct. R. 37.2(a) 1

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Felix Frankfurter, *A Note on Advisory Opinions*, 37 Harv. L. R. 1002 (1924) 6

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Tracy A. Roman, *Stretching – And Straining – The Concept of 'Injury'*, Law360, New York (Feb. 4. 2015) 12

Sheila B. Scheuerman, Due Process Forgotten: The Problem of Statutory Damages and Class Actions, 74 Mo. L. Rev. 103 (Winter 2009) 13

Paul A. Scrudato, *et al.*, *No Injury? No Prolem.*, Product Liability & Mass Torts Blog (May 31, 2015) 11

STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae DRI – the Voice of the Defense Bar, is an international organization of more than 22,000 attorneys involved in the defense of civil litigation. DRI is committed to enhancing the skills, effectiveness, and professionalism of defense attorneys. Because of this commitment, DRI seeks to promote the role of defense attorneys, to address issues germane to defense attorneys and their clients, and to improve the civil justice system. DRI has long participated in the ongoing effort to make the civil justice system fairer, more consistent, and more efficient. See http://www.dri.org/About. To that end, DRI participates as amicus curiae in cases that raise issues of importance to its membership and to the judicial system. This is one of those cases.

DRI's interest in this case stems from its members' extensive involvement in civil litigation. DRI's members are regularly called upon to defend their clients in lawsuits brought merely to pursue public policies rather than to seek redress for a distinct and personalized injury. If affirmed, the Ninth Circuit's decision in this case will have a profound effect on businesses and individuals who may be subject to suits

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from amicus curiae, its members, and its counsel, made any monetary contribution towards the preparation and submission of this brief. Pursuant to Supreme Court Rule 37.2(a), *amicus curiae* certifies that counsel of record for both petitioner and respondent have, after timely notification, consented to this filing in emails enclosed with this *Amicus* Brief.

brought under the Fair Credit Reporting Act, 15 U.S.C. § 1681, *et seq.*, and other federal and state statutes providing for statutory damages because the decision broadens the doctrine of standing to allow the judiciary to resolve disputes in the absence of an actual injury. A decision that follows the Ninth Circuit's rationale will likely result in an increase in the filing of lawsuits by non-injured plaintiffs. DRI has a strong interest in assuring that the many federal and state statutes which confer a statutory cause of action do not provide a "back door" for uninjured litigants to obtain relief in federal court. Alteration of the standing doctrine threatens to open the floodgates of litigation in derogation of the Framers' intent to limit the jurisdiction of the judicial branch to "cases" and "controversies." This, in turn, directly affects the fair, efficient, and consistent functioning of our civil justice system and, as such, is of vital interest to the members of DRI.

The ability of plaintiffs to circumvent Article III's standing requirement and proceed in class action and other litigation absent actual injury presents an ongoing point of concern for DRI's members. The issue of standing and its outer limits is frequently studied and discussed by DRI's membership in a variety of contexts. *See, e.g.*, Nora Coleman, et. al., Stopped Before They Start: Dismissing No-Injury Class Actions, DRI For Def. 42 (December 2010) (providing strategies for attacking standing in no-injury class actions); Brian A. Bender, et. al., A Gathering Storm: New Developments in Climate Change Litigation, DRI for Def. 50 (January 2010) (discussing noteworthy decisions involving proprietary standing and parens patriae standing); Jeffrey A. Holmstrand, Statutory

Consumer Fraud Act Claims: Enforcing the Reliance Requirement, DRI For Def. 43 (October 2010) (recognizing the exponentially-broadened exposure a defendant faces as a result of statutory consumer fraud act claims brought on behalf of large numbers of people, many or most of whom did not sustain any actual injury). DRI therefore has a unique vantage point to help this Court understand the importance of proper interpretation of federal statutory damages statutes in light of the constitutionally-mandated standing requirements, not only from a legal standpoint, but also from practical and economic standpoints as well. Based on its members' extensive practical experience, DRI is uniquely suited to explain why this Court should adopt a rule which adheres to Article III standing's requirement of injury-in-fact.

SUMMARY OF THE ARGUMENT

The Ninth Circuit's decision in this case casts aside fundamental principles of Article III standing law in order to facilitate federal suits brought by plaintiffs who suffer no concrete harm. With scant legal analysis, the Ninth Circuit ruled that the "creation of a private cause of action to enforce a statutory provision implies that Congress intended the enforceable provision to create a statutory right," and that "the violation of a statutory right is usually a sufficient injury in fact to confer standing." *Robins v. Spokeo, Inc.*, 742 F.3d 409, 412 (9th Cir. 2014), citing *Edwards v. First Am. Corp.*, 610 F.3d 514, 517 (9th Cir. 2010). That ruling, made in the context of the Fair Credit Reporting Act, 15 U.S.C. § 1681, *et seq.*, pays no heed to this Court's command that statutory language purportedly entitling any person to sue cannot abrogate

constitutionally-required standing. *Allen v. Wright*, 468 U.S. 737, 750-51 (1984). The ruling also turns the three-part test for Article III standing into a single-factor inquiry satisfied by the availability of a statutory remedy, which contradicts this Court's precedents and represents a grave misunderstanding of the standing doctrine mandated by Article III's limitation on the judiciary's power to only "cases" or "controversies." As this Court observed in *Lujan v. Defenders of Wildlife*, "[Statutory] broadening [of] the categories of injury that may be alleged in support of standing is a different matter from abandoning the requirement that the party seeking review must himself have suffered an injury." 504 U.S. 555, 578 (1992), quoting *Sierra Club v. Morton*, 405 U.S. 727, 738 (1972).

A rule allowing a plaintiff to invoke the jurisdiction of the federal court under a federal statute creating a private right of action – even though the plaintiff has suffered no concrete harm – promises to encourage others who have suffered no "actual injury" to enter federal courts through the "back door", a practice this Court has expressly disapproved. *Allee v. Medrano*, 416 U.S. 802, 828-29 (1974) (Burger, C.J., concurring). This, in turn, will undoubtedly result in the increase of costly litigation against businesses and individuals that was not intended by the Framers of the United States Constitution. Additionally, a rule excusing plaintiffs from satisfying the Article III injury-in-fact requirement undermines class certification standards. These burdens, moreover, will not be restricted to claims brought pursuant to the Fair Credit Reporting Act; the Ninth Circuit's broad standing analysis, if not reversed by this Court, will be used by opportunistic plaintiffs to bring suits under a myriad of federal

statutes embracing this "no harm" approach to litigation.

The Ninth Circuit's decision should be reversed because a Congressionally-created private right of action based on a bare violation of a federal statute does not dispense with a plaintiff's requirement to establish Article III standing based upon a showing of concrete harm.

ARGUMENT

A Congressionally-Created Private Right Of Action, Based On A Bare Violation Of A Federal Statute, Does Not Satisfy, Dispose Of, Or Otherwise Lessen A Plaintiff's Obligation To Establish Article III Standing, Including The Existence Of Actual Injury.

A. Constitutional standing is an indispensable requirement of any federal suit.

The doctrine of standing assures that the "courts exercise power 'only in the last resort, and as a necessity,' and only when adjudication is consistent with a system of separated powers and [the dispute is one] traditionally thought to be capable of resolution through the judicial process." John G. Roberts, *Article III Limits On Statutory Standing*, 42 Duke L. R. 1219, 1223-1224 (1983), quoting *Allen v. Wright*, 468 U.S. 737, 750-51 (1984). A threshold requirement to any suit in federal court, constitutional standing is derived from Article III's limitation of the judicial power of the United States to the resolution of "Cases" and "Controversies." U.S. Constitution, art. III, § 2; *Hein v. Freedom From Religions Foundation, Inc.*, 551 U.S.

587, 598 (2007); *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992); *Friends of the Earth, Inc v. Laidlaw Environmental Services*, 528 U.S. 167 (2000). It has been said that Article III requires a live contest in which to test legal differences. Felix Frankfurter, *A Note on Advisory Opinions*, 37 Harv. L. R. 1002, 1006 (1924). The issue of standing depends upon whether the party has alleged such a personal stake in the outcome of the controversy as to ensure that the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution. Stated otherwise, it is incumbent upon a party to demonstrate more than just a commitment to vigorous advocacy. *Lujan, supra,* at 559-560. See also *Summers v. Earth Island Institute*, 129 S. Ct. 1142, 1148-49 (2009).

Those who seek to invoke the jurisdiction of the federal courts *must* therefore satisfy the threshold standing requirement imposed by Article III. *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983). It is not optional: constitutional standing is "'the irreducible constitutional minimum' of standing." *Lujan, supra*, at 560. That means a plaintiff must demonstrate "a personal stake in the outcome" in order to assure the presence of concrete adverse interests which sharpens the presentation of issues necessary for the proper resolution of constitutional questions. *Lyons, supra*, at 101. Under such an approach, abstract injury is not enough. (*Id.*). A plaintiff must show that she sustained or is immediately in danger of sustaining some direct injury as a result of the challenged official conduct and the injury or threat of injury must be both real and immediate, not conjectural or hypothetical. (*Id.* at 102). The plaintiff must also demonstrate that

the injury will likely be redressed by a favorable decision. *Friends of the Earth v. Laidlaw Environmental Services*, *supra*, at 180-81.

B. The mere violation of a statutory right does not satisfy constitutional standing absent a concrete, *de facto* harm.

Statutory standing pursuant to the Fair Credit Reporting Act or some other federal statute does not dispense with the requirement that a plaintiff also possess constitutional standing under Article III. *Loren v. Blue Cross & Blue Shield of Mich.*, 505 F.3d 598, 606-07 (6th Cir. 2007). As this Court has previously recognized, "Congress 'cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing.'" *Raines v. Byrd*, 521 U.S. 811, 820 n. 3 (1997), citing *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979). This Court made this point perhaps even clearer when it said:

> Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules. Of course, Art. III's requirement remains: the plaintiff must still allege a distinct and palpable injury to himself, even if it is an injury shared by a large class of other possible litigants.

Warth v. Seldin, 422 U.S. 490, 501 (1975).

In an improper interpretation of *Warth*, the Ninth Circuit in this case held that the "creation of a private cause of action to enforce a statutory provision implies that Congress intended the enforceable provision to create a statutory right," 742 F.3d at 412, and that "the

violation of a statutory right is usually sufficient injury in fact to confer standing." *Id.* (citing *Edwards v. First Am. Corp.*, 610 F.3d 514, 517 (9th Cir. 2010)). This was not what *Warth* concluded. *Warth* merely noted that the "injury required by Art[icle] III *may* exist solely by virtue of statutes creating legal rights, the invasion of which creates standing." 422 U.S. at 500 (emphasis added). *Warth* in no way held that constitutional standing was synonymous with statutory standing so that the latter dispenses with the need to establish the former. But this is exactly what the Ninth Circuit concluded. Specifically, the Ninth Circuit reasoned that because "the statutory cause of action does not require a showing of actual harm when a plaintiff sues for willful violations[,]" actual harm was unnecessary to establish injury in fact. 742 F.3d at 412. In so ruling, the Ninth Circuit recognized that its analysis essentially turns the three-part test for Article III standing – which requires a showing of causation and redressability – into a single-factor inquiry satisfied by the availability of a statutory remedy. *Id.* at 414. Departing from this Court's jurisprudence, the Ninth Circuit rationalized that "[w]hen the injury in fact is the violation of a statutory right that we inferred from the existence of a private cause of action, causation and redressability will usually be satisfied." *Id.*

This ruling should be reversed. As this Court made clear in *Lujan v. Defenders of Wildlife*, the language from *Warth* cited by the Ninth Circuit simply means that the violation of a statutory right might satisfy Article III standing, but *only if* the statutory violation has caused a concrete, *de facto* injury independent of the statute. *Lujan*, 504 U.S. at 578 ("Whether or not the principle set forth in *Warth* can be extended beyond

that distinction, it is clear that in suits against the Government, at least, the concrete injury requirement must remain."). See also *Sierra Club v. Morton*, 405 U.S. 727, 738 (1972) ("But [statutory] broadening [of] the categories of injury that may be alleged in support of standing is a different matter from abandoning the requirement that the party seeking review must himself have suffered an injury."). In short, while Congress can authorize a private right of action based on a bare violation of a federal statute, it cannot circumvent Article III's requirement of actual injury.

Reversing the Ninth Circuit's decision in this case comports with other circuits that have properly addressed the issue in the context of other federal statutes authorizing a private right of action. Over a decade ago, the Third Circuit held that plaintiffs must allege actual injury – not just a statutory violation of the Lanham Act, 15 U.S.C. § 1051, *et seq.*, - in order to establish Article III standing. *Joint Stock Soc'y v. UDV North America*, 266 F.3d 164, 176 (3d Cir. 2001). Similarly, the Third Circuit has held, in the context of the Fair Housing Act, that "[t]he fact that a housing organization is able to show that a particular advertisement violates the [Fair Housing] Act is not sufficient to satisfy the requirements of Article III; a violation of the Act does not automatically confer standing on any plaintiff, even one who holds the status of a private attorney general." *Fair Housing Council of Suburban Philadelphia v. Main Line Times*, 141 F.3d 439, 443-444 (3d Cir. 1998). The Second Circuit reached a like result, refusing to allow a claim under ERISA to proceed absent actual injury. *Kendall v. Employees Retirement Plan of Avon Prods.*, 561 F.3d 112, 121 (2d Cir. 2009). Most recently, the Fourth

Circuit held (again in the context of an ERISA action) that the mere violation of a statutory right does not satisfy Article III's standing requirement of an actual, concrete injury. *David v. Alphin*, 704 F.3d 327, 338-39 (4th Cir. 2013).

The standing doctrine is a critical element of the separation-of-powers principle, which is fundamental to the protection of our liberty. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 340-342 (2006). Under the doctrine of the separation of powers, each branch of government has powers that belong to it and cannot be transferred to another branch of government. The doctrine of standing recognizes and honors those bounds. When a court erodes Article III's standing requirement by permitting a suit to proceed based on a bare statutory violation – even though the plaintiff does not have an actual injury, on the theory that the statutory violation alone confers standing -- it strips Article III of its power and upsets the equilibrium among the separate branches of government. That is exactly what the Ninth Circuit did in this case when it held that standing is demonstrated whenever there is a "violation of a statutory right[.]" 742 F.3d at 412. By conflating the constitutionally-derived standing requirement with the statutory right, the Ninth Circuit adopted a rule that essentially granted the Legislature the power to expand the judicial power. This cannot be allowed to stand.

C. Public policy considerations support a reversal.

The FCRA is not the only federal statute embracing this "no harm" approach to litigation. From the Telephone Consumer Protection Act to the Real Estate

Settlement Procedures Act to the Truth in Lending Act, Congress has authorized suits based on a mere statutory violation. For example, the Telephone Consumer Protection Act, 47 U.S.C. § 227(3), allows a private right of action with an alternative-damages provision. Similarly, the Real Estate Settlement Procedures Act, 12 U.S.C. § 2607, prohibits kickbacks in certain mortgage-loan transactions. The Truth in Lending Act, 15 U.S.C. § 1640, contains an alternative-damages provision that has been interpreted to allow a consumer to bring a claim and receive damages upwards of $500,000 without any showing of actual injury or damages. *See, e.g.*, *Gambardella v. G. Fox & Co.*, 716 F.2d 104 (2d Cir. 1983); *Purtle v. Eldridge Auto Sales, Inc.*, 91 F.3d 797 (6th Cir. 1996). Accordingly, this Court's decision may be used as a roadmap in suits well beyond those brought under the FCRA. Paul A. Scrudato, *et al.*, *No Injury? No Prolem.*, Product Liability & Mass Torts Blog (May 31, 2015) (noting that since the Ninth Circuit's decision in this case, 29 FCRA class actions were filed in the first four months of 2014). Specifically, this Court's decision will impact suits brought under approximately fifteen federal statutes permitting suits based on mere statutory violations alone. *See, e.g.*, 15 U.S.C. § 1692 (Fair Debt Collection Practices Act); 29 U.S.C. § 1854 (Migrant and Seasonal Agricultural Worker Protection Act); 15 U.S.C. § 1693m(a)(2) (Electronic Funds Transfer Act); 12 U.S.C. § 4907 (Homeowners Protection Law); 15 U.S.C. § 1681, *et. seq.* (Fair and Accurate Credit Transactions Act).

These legislatively-conferred statutory suits can be brought through any of a number of means, but are typically brought in the form of a class action, as in this

case. "The impact of federal statutes that allow the award of statutory damages for violations that cause no harm is exponentially multiplied by the class-action mechanism of Federal Rule of Civil Procedure 23." Michael O'Neil, Privacy and Surveillance Legal Issues, Leading Lawyers on Navigating Changes in Security Program Requirements and Helping Clients Prevent Breaches – The Transformation of the "Right to Privacy" and its Unintended Liability Consequences, 2014 WL 10441, *6 (Aspatore Jan. 2014).

This is so because relaxation of the standing requirement broadens dramatically the composition of a class litigating a violation of the FCRA or other similar "no harm" statute.[2] This, in turn, dramatically increases the expense of defending a class action.[3] Absent a reversal by this Court, defendants may be forced to make payouts to hundreds or even thousands of unharmed class members. In addition, due to the violation of some statutory standard, a non-injured

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[2] The broadening of class composition in this fashion has been the topic of much conversation in recent times, particularly in light of widespread data breaches where class plaintiffs have not been subjected to fraudulent charges or other injury. Tracy A. Roman, *Stretching – And Straining – The Concept of 'Injury'*, Law360, New York (Feb. 4. 2015).

[3] Even before the Ninth Circuit's decision in this case, the attendant costs of a major lawsuit could sound the death knell for new companies and those suffering under today's current economic climate. Bradley J. Bondi, *Facilitating Economic Recovery and Sustainable Growth Through Reform of the Securities Class-Action System: Exploring Arbitration as an Alternative to Litigation*, 33 Harv. J. L. & Pub. Pol'y 607, 612 (Spring 2010).

plaintiff might be deemed a "prevailing party" entitled to attorney fees.

The unwarranted economic burden this imposes on defendants cannot be overstated. As one legal scholar noted, "aggregated statutory damages claims can result in absurd liability exposure in the hundreds of millions – or even billions – of dollars on behalf of a class whose actual damages are often nonexistent." Sheila B. Scheuerman, Due Process Forgotten: The Problem of Statutory Damages and Class Actions, 74 Mo. L. Rev. 103, 104 (Winter 2009). Stated another way, a class judgment based on a statutory damages claim can have an "annihilating effect" on a defendant. *O'Neil*, *supra*, at *6. Defendants, unwilling to roll the dice, are placed under intense pressure to settle, even if an adverse judgment seems "improbable." See *Thorogood v. Sears, Roebuck and Co.*, 547 F.3d 742, 745 (7th Cir. 2008); *Matter of Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995). See also Barry F. McNiel, *et. al.*, *Mass Torts and Class Actions: Facing Increased Scrutiny*, 167 F.R.D. 483, 489-90 (updated 8/5/96). A relaxation of the standing requirement will only exacerbate these problems and proliferate more of these "blackmail settlements." *Rhone*, *supra* at 1298, citing Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (1973).

Congress acts properly to create a statutory cause of action to incentivize defendants to conform their conduct to the law. But litigation brought by entrepreneurial class action attorneys attempting to serve as private attorneys general in lieu of the federal government harms the civil justice system, both because it creates enormous litigation costs with no

attendant benefit and because it destabilizes the carefully-calibrated equilibrium between the political branches of government and the judiciary. By limiting suits to the constitutional framework of a "case" or "controversy," standing assures that corporations and individuals will not be subject to academic litigation where the complaining party has suffered no real injury. Careful adherence to the standing doctrine also guards against plaintiff attorneys, and particularly class action attorneys, receiving exorbitant fees that may put a corporation out of business for a statutory violation unaccompanied by any cognizable injury.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision below.

Respectfully submitted,

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REPLY BRIEF

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IN THE

Supreme Court of the United States

SPOKEO, INC.,

Petitioner,

v.

THOMAS ROBINS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR AMICI CURIAE EBAY INC., FACEBOOK, INC., GOOGLE INC., IAC/INTERACTIVECORP, LINKEDIN CORP., NETFLIX, INC., TWITTER, INC., YAHOO! INC., THE CONSUMER ELECTRONICS ASSOCIATION, DIGITAL CONTENT NEXT, AND THE INTERNET ASSOCIATION IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 5

ARGUMENT 7

I. THE ARTICLE III STANDING REQUIREMENT IS FUNDAMENTAL TO THE INVOCATION OF FEDERAL JUDICIAL POWER 7

A. Article III Standing Requires An Actual Injury 7

B. The Article III Standing Requirement Protects The Separation Of Powers 11

II. EROSION OF THE INJURY-IN-FACT REQUIREMENT INVITES ABUSIVE LITIGATION AGAINST TECHNOLOGY COMPANIES 12

A. Courts Following The Ninth Circuit's Reasoning Routinely Find Standing Based Solely On Alleged Injuries-In-Law 12

B. The Ability To Seek Class-Wide Statutory Damages For Mere Injuries-In-Law Allows Plaintiffs To Extract *In Terrorem* Settlements 19

III. THE EXECUTIVE BRANCH CAN AND DOES ACT ON BARE STATUTORY VIOLATIONS AND PRIVATE LITIGANTS MAY VINDICATE LEGAL RIGHTS WHERE ACTUAL HARM OCCURS 24

CONCLUSION 27

TABLE OF AUTHORITIES

CASES

Page(s)

Allen v. *Wright*, 468 U.S. 737 (1984) 11

American Express Co. v. *Italian Colors Restaurant*, 133 S. Ct. 2304 (2013) 16

Boggs v. *Alto Trailer Sales, Inc.*, 511 F.2d 114 (5th Cir. 1975) 26

C.M.D. v. *Facebook, Inc.*, 2014 WL 1266291 (N.D. Cal. Mar. 26, 2014) 18

Chicago & Grand Trunk Railway Co. v. *Wellman*, 143 U.S. 339 (1892) 11

Clapper v. *Amnesty International USA*, 133 S. Ct. 1138 (2013) 12

Cobb v. *Monarch Finance Corp.*, 913 F. Supp. 1164 (N.D. Ill. 1995) 16

Comcast Corp. v. *Behrend*, 133 S. Ct. 1426 (2013) 16

David v. *Alphin*, 704 F.3d 327 (4th Cir. 2013) 13

Day v. *Bond*, 500 F.3d 1127 (10th Cir. 2007) 13

Deacon v. *Pandora Media, Inc.*, 901 F. Supp. 2d 1166 (N.D. Cal. 2012) 19

Edwards v. *First American Corp.*, 610 F.3d 514 (9th Cir. 2010), *dismissed as improvidently granted*, 132 S. Ct. 2536 (2012) 8

Fraley v. *Facebook, Inc.*, 2013 WL 4516806 (N.D. Cal. Aug. 26, 2013) 21

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TABLE OF AUTHORITIES—Continued

Page(s)

Gaos v. *Google Inc.*, 2012 WL 1094646 (N.D. Cal. Mar. 29, 2012) 17, 22

Gladstone, Realtors v. *Village of Bellwood*, 441 U.S. 91 (1979) 9

Goodman v. *HTC America, Inc.*, 2012 WL 2412070 (W.D. Wash. June 26, 2012) 19

In re Facebook Privacy Litigation, 791 F. Supp. 2d 705 (N.D. Cal. 2011), *aff'd*, 750 F.3d 1098 (9th Cir. 2014) 16, 17

In re Google Referrer Header Privacy Litigation, 2014 WL 1266091 (N.D. Cal. Mar. 26, 2014) 22

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In re Hulu Privacy Litigation, 2013 WL 6773794 (N.D. Cal. Dec. 20, 2013) 18

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TABLE OF AUTHORITIES—Continued

Page(s)

Kendall v. *Employees Retirement Plan of Avon Products*, 561 F.3d 112 (2d Cir. 2009) 13

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Lane v. *Facebook, Inc.*, 696 F.3d 811 (9th Cir. 2012) 23

Lexmark International, Inc. v. *Static Control Components, Inc.*, 134 S. Ct. 1377 (2014) 11

Lujan v. *Defenders of Wildlife*, 504 U.S. 555 (1992) 7, 8, 9, 10, 13

Newman v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968) 26

Perkins v. *LinkedIn Corp.*, 53 F. Supp. 3d 1190, 1208 (N.D. Cal. 2014) 16

Pimental v. *Google, Inc.*, 2012 WL 1458179 (N.D. Cal. Apr. 26, 2012) 23

Raines v. *Byrd*, 521 U.S. 811 (1997) 7, 9

Ramirez v. *Trans Union, LLC*, 301 F.R.D. 408 (N.D. Cal. 2014) 15

Rowden v. *Pacific Parking Systems, Inc.*, 282 F.R.D. 581 (C.D. Cal. 2012) 26

Shaw v. *Marriott International, Inc.*, 605 F.3d 1039 (D.C. Cir. 2010) 13

Smith v. *Microsoft Corporation*, 2012 WL 2975712 (S.D. Cal. July 20, 2012) 18

TABLE OF AUTHORITIES—Continued

Page(s)

Summers v. *Earth Island Institute*, 555 U.S. 488 (2009) 9, 10

United States v. *Raines*, 362 U.S. 17 (1960) 11

Valley Forge Christian College v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982) 7, 10, 11

DOCKETED CASES

Pimental v. *Google Inc.*, No. 11-cv-2585 (N.D. Cal.) 23

United States v. *Infotrack Information Services, Inc.*, No. 14-cv-2054 (N.D. Ill.) 25

United States v. *Instant Checkmate, Inc.*, No. 14-cv-675 (S.D. Cal.) 25

United States v. *Path, Inc.*, 13-cv-448 (N.D. Cal.) 25

AGENCY MATERIALS

In re Dialing Services, LLC, No. 12-1812 (FCC) 25

In re DriveTime Automotive Group, Inc., No. 2014-17 (CFPB) 25

In re Goldenshores Technologies, LLC, No. 132-3087 (FTC) 25

In re Presidential Who's Who, Inc., No. 12-217 (FCC) 26

In re Security First of Alabama, LLC, No. 12-258 (FCC) 25

In re Snapchat, Inc., No. 132-3078 (FTC) 25

TABLE OF AUTHORITIES—Continued

Page(s)

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. art. II, § 3 11

15 U.S.C. § 1681n(1)(A) 8

18 U.S.C.
- §§ 2510-2522 5,14
- § 2520(a) 14
- § 2520(b)(1) 26
- § 2520(b)(3) 14, 26
- § 2520(c)(2)(B) 14
- §§ 2701-2712 ..... 5, 14
- § 2707(a) 14
- § 2707(b)(1) 26
- § 2707(b)(3) 14, 26
- § 2707(c) 14
- § 2710 ..... 5, 15
- § 2710(c)(1) 15
- § 2710(c)(2) 15
- § 2710(c)(2)(B) 26
- § 2710(c)(2)(C) 26
- § 2710(c)(2)(D) 26

28 U.S.C.
- § 1332(a) 15
- § 1332(d) 15
- § 1367 15

47 U.S.C.
- § 227 ..... 5, 15
- § 227(b)(3) 15, 26
- § 227(b)(3)(A) 15, 26
- § 227(b)(3)(B) 15

765 Ill. Comp. Stat. 1075/1 *et seq.* 18

TABLE OF AUTHORITIES—Continued

Page(s)

Mich. Comp. Laws § 445.1712 19

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INTEREST OF AMICI CURIAE[1]

Amici are leading media and technology companies that provide a wide variety of services via the Internet to hundreds of millions of users each day.

eBay Inc., with 157 million active buyers globally and more than 800 million items listed for sale, is one of the world's largest online marketplaces, where practically anyone can buy and sell practically anything. Founded in 1995, eBay connects a diverse and passionate community of individual buyers and sellers, as well as small businesses, whose collective impact on e-commerce is staggering.

Facebook, Inc. provides a free social media service to more than 1.4 billion people that empowers them to connect with others, to discover what is happening in their communities, and to share their views on the world. The service is now provided in over 100 languages and dialects.

Google Inc. is a technology company that offers a suite of web-based products and services to billions of people worldwide. Google's search engine processes more than 3.5 billion searches per day and more than 1 trillion searches per year. Google's Gmail service provides email for 900 million global users. Google Maps is used by more than 1 billion people each month.

IAC/InterActiveCorp is a diversified online media company with more than 150 brands and products.

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[1] Pursuant to Rule 37.6, amici certify that no counsel for either party authored this brief, and no person or party other than named amici, their members, and their counsel made a monetary contribution to the preparation or submission of this brief. Letters of consent have been filed with the Clerk.

IAC's businesses are leaders in numerous sectors of the Internet economy and include Match.com, OkCupid, Ask.com, About.com, HomeAdvisor, The Daily Beast, Investopedia, and Vimeo. IAC's family of websites receive more than 2.5 billion visits each month from users in over 200 countries.

LinkedIn Corp. hosts the world's largest professional network, with more than 364 million members in over 200 countries and territories globally, including more than 115 million members in the United States. LinkedIn's mission is to connect the world's professionals to make them more productive and successful, and LinkedIn members have access to people, jobs, news, updates, and insights that help them be great at what they do.

Netflix, Inc. is a pioneer in the delivery of movies and television over the Internet and is now the world's leading Internet television network. Netflix has more than 62 million subscribers in over 50 countries who watch more than 100 million hours of television shows and movies per day, including original series, documentaries, and films.

Twitter, Inc. offers a free service to more than 300 million active monthly users that allows them to connect with others, express ideas, and discover new information. Roughly 500 million short messages (known as "Tweets") are posted on Twitter every day.

Yahoo! Inc., together with its consolidated subsidiaries, is a guide focused on making users' digital habits inspiring and entertaining. By creating highly personalized experiences for its users, Yahoo keeps people connected to what matters most to them across devices and around the world. In 2014, Yahoo's global user

base across search, communications, and digital content grew to more than 1 billion monthly active users.

The Consumer Electronics Association (CEA) is the preeminent technology trade association promoting growth in the $208 billion U.S. consumer electronics industry through market research, education, and public policy representation. CEA members lead the consumer electronics industry in the development, manufacturing, and distribution of audio, video, mobile electronics, communications, information technology multimedia, and accessory products, as well as related services sold to consumers.[2]

Digital Content Next is a trade association that represents high-quality digital content companies, including some of the world's most well-known and respected media brands, such as The Associated Press, ESPN, The Financial Times, Fox News, The New York Times, National Public Radio, and The Washington Post.[3]

The Internet Association represents the interests of thirty-five leading Internet companies. It seeks to protect Internet freedom, promote innovation and economic growth, and empower customers and users.[4]

The services and technology offered by amici have created or transformed a wide range of industries, including electronic communications in all forms, financial

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[2] A list of the CEA's members is available at https://www.ce.org/Membership/Membership-Directory.aspx.

[3] A list of Digital Content Next's members is available at https://digitalcontentnext.org/membership/members/.

[4] A list of the Internet Association's members is available at http://internetassociation.org/our-members/.

transactions and online commerce, social networking, the generation and delivery of media content, and the organization and accessibility of information. Amici are proven innovators that continue to generate valuable technology and services through significant investments in research and development. The volume and type of communications and interactions that amici's technologies facilitate, however, make amici disproportionately susceptible to the consequences of the Ninth Circuit's misreading of Article III's injury-in-fact requirement. Amici's activities may fall within the ambit of many federal and state laws that confer private causes of action and contain statutory damages provisions similar to the provisions at issue in this case. Indeed, in recent years, amici have increasingly been subjected to litigation under these types of statutes, in which the only "harm" alleged is a bare statutory violation.

Thus, amici are concerned that the Article III standing rule adopted by the Ninth Circuit, which allows plaintiffs to bring suits in federal court based on nothing more than an allegation of a bare statutory violation without any requirement of actual harm, is contrary to this Court's precedent and renders technology companies, including amici, uniquely vulnerable to baseless and abusive litigation. Amici, and the billions of individuals they serve worldwide (often with free or very low-cost services), thus have an interest in this Court reaffirming the injury-in-fact requirement. Accordingly, amici ask that this Court confirm that Article III standing exists only when the plaintiff alleges concrete, actual harm, and reverse the judgment below.[5]

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[5] Amici's interest in this case is limited to the Article III standing question presented and should not be construed as expressing any view on the merits of petitioner's alleged statutory violations.

SUMMARY OF ARGUMENT

Amici provide a wide variety of innovative and important services that rely on highly sophisticated computer programming and systems to serve millions of people each day. These systems are essential to amici's ability to automatically process and facilitate billions of complex transactions and interactions efficiently for people across the globe. This automation enables amici to unlock the power of modern communications technology to deliver immense value to users, usually at no or very little cost. But this model, which is deployed by amici on an immense scale, also makes amici and similar businesses uniquely vulnerable to the untoward consequences of the Ninth Circuit's misreading of Article III.

The services and products amici provide may be subject to federal and state laws that confer private rights of action and contain statutory damages provisions similar to the provisions in the Fair Credit Reporting Act (FCRA) at issue in this case. These statutes include the Wiretap Act (as amended by the Electronic Communications Privacy Act of 1986), 18 U.S.C. §§ 2510-2522, the Stored Communications Act, *id.* §§ 2701-2712, the Video Privacy Protection Act, *id.* § 2710, and the Telephone Consumer Protection Act, 47 U.S.C. § 227. Amici are frequently targeted by opportunistic lawsuits based on alleged violations of these and similar statutes, in which the only alleged harm is a bare statutory violation—an injury-in-law, not an injury-in-fact. Rather than requiring concrete, actual harm to establish a "case or controversy" appropriate for judicial resolution, the Ninth Circuit's reasoning in this and other cases allows such suits for bare statutory violations to proceed with no limiting principle. Amici ask the Court to reverse the Ninth Circuit and clarify that Article III standing requires an allegation of actual injury.

Amici are concerned that the misguided Article III standing jurisprudence embodied by the decision below creates incentives for plaintiffs to pursue such no-injury lawsuits in federal court with increased frequency, with a concomitant increase in the negative effects these suits have on the technology industry. Permitting these abusive no-injury lawsuits to proceed beyond the pleading stage has a particularly negative impact on amici due to the broad scale of their operations. Amici's successful innovations and use of easily replicated computer processes allow billions of people to benefit from the valuable services and products they provide, usually at little or no cost to consumers. Yet, under the Ninth Circuit's standing rule, if any of the millions of individuals who interact with amici each day is willing (or is enticed by the plaintiffs' bar) to allege that a generalized act or practice by amici violated a statute that provides a private cause of action and statutory damages, she can, without more, launch a putative class action on behalf of herself and millions of other "similarly situated" users. Exploiting the lax Ninth Circuit standing rule, a named plaintiff in such a suit can (and, as explained below, often does) pursue a multi-billion dollar statutory damages claim despite the lack of any actual injury to herself or any other class member. Even without pursuing a class action, a single plaintiff who suffered no injury could attempt to obtain punitive damages through an individual suit under FCRA or other similarly structured statutes, or the injunctive relief that is available under many other statutes that also provide for statutory damages.

The rigors of Article III must be applied to these suits in the same way they are applied to any other lawsuit brought in federal court—the plaintiffs must allege an actual, redressable injury. If the injury re-

quirement does not apply, then companies like amici will continue to be wrongly subjected to the substantial expense of defending such actions and the risks of massive class-wide statutory damages or burdensome injunctive relief, creating a strong incentive to settle even the most frivolous suits. That creates a perverse incentive that rewards plaintiffs (and their attorneys) for filing meritless strike suits in circumstances where not a single person has been harmed. Article III's standing requirement exists to prevent precisely this result.

ARGUMENT

I. THE ARTICLE III STANDING REQUIREMENT IS FUNDAMENTAL TO THE INVOCATION OF FEDERAL JUDICIAL POWER

A. Article III Standing Requires An Actual Injury

"'No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies.'" *Raines* v. *Byrd*, 521 U.S. 811, 818 (1997). To meet the case or controversy requirement, a plaintiff's complaint "must establish that [the plaintiff] ha[s] standing to sue." *Id.* To have standing, "the plaintiff must have suffered an 'injury in fact'" which is both "concrete and particularized" and "'actual or imminent, not "conjectural" or "hypothetical."'" *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *see also Valley Forge Christian Coll.* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 473 (1982) ("The exercise of judicial power, which can so profoundly affect the lives, liberty, and property of those to whom it extends, is ... restricted to litigants who can show 'injury in fact' resulting from the action which they seek to have the court adjudicate."). Thus, the injury-in-fact alleged in a plaintiff's

complaint "must *affect the plaintiff* in a personal and individual way." *Lujan* v. *Defenders of Wildlife*, 504 U.S. at 560 n.1 (emphasis added); *see also id.* at 581 (Kennedy, J., concurring in part and concurring in the judgment) ("[T]he party bringing suit must show that the action injures him in a concrete and personal way.").

Respondent Robins's putative class complaint alleges that Spokeo is a credit reporting agency that willfully violated various provisions of FCRA (Pet. App. 2a, 19a-20a), which provides consumers with a private right of action to recover "any actual damages ... *or* damages of not less than $100 and not more than $1,000" for any willful failure to comply with the various requirements imposed by the Act, 15 U.S.C. § 1681n(1)(A) (emphasis added). Robins seeks statutory damages for himself and a putative class that allegedly "'consists of millions of individuals.'" Pet. 15. The district court dismissed the complaint for lack of Article III standing because Robins had not alleged "any actual or imminent harm." Pet. App. 13a. The Ninth Circuit reversed, holding that Robins had standing because "alleged violations of [his] statutory rights are sufficient to satisfy the injury-in-fact requirement of Article III." *Id.* 8a. The Ninth Circuit's holding follows its earlier decision in *Edwards* v. *First American Corp.*, 610 F.3d 514 (9th Cir. 2010), a case in which this Court's grant of certiorari was later dismissed as improvidently granted, 132 S. Ct. 2536 (2012). The decision below is also consistent with subsequent precedent from the Ninth Circuit. *See In re Zynga Privacy Litig.*, 750 F.3d 1098, 1105 n.5 (9th Cir. 2014) (rejecting argument that "plaintiffs lack standing because they have not suffered any concrete or particularized injury" and holding that "a plaintiff demonstrates an injury sufficient to satisfy Article III when bringing a claim under

a statute that prohibits the defendant's conduct and grants persons in the plaintiff's position a right to judicial relief" (internal quotation marks omitted)).

By allowing plaintiffs to maintain lawsuits in federal court based solely upon injuries-in-law and in the absence of any actual harm, the Ninth Circuit's rule contravenes this Court's longstanding precedent that, "[i]n order to satisfy Art[icle] III, the plaintiff must show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant." *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 99 (1979). This Court's holdings make plain that Congress cannot confer Article III standing through legislation. While Congress has the authority to create legal remedies for actual "*de facto* injuries" that were not previously recognized in law, *Lujan* v. *Defenders of Wildlife*, 504 U.S. at 578, it is also "settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing," *Raines*, 521 U.S. at 820 n.3. *See also Gladstone, Realtors*, 441 U.S. at 100 ("[I]n no event, however, may Congress abrogate the Art[icle] III minima: A plaintiff must always have suffered 'a distinct and palpable injury to himself,' that is likely to be redressed if the requested relief is granted." (citation omitted)). "[T]he requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute." *Summers* v. *Earth Island Inst.*, 555 U.S. 488, 497 (2009).[6]

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[6] The question presented in this case implicates not only Article III standing for bare violations of federal statutes that cause no actual harm, but also the ability of federal courts to adjudicate alleged violations of state statutory rights and remedies despite the lack of any actual injury to the plaintiff. The Ninth Circuit's broad recognition of standing based on alleged injuries-in-law has been

This Court has taught that an actual injury-in-fact is required to invoke the federal judicial power, a constitutional requirement that cannot be abrogated by legislation. But the Ninth Circuit has concluded that Congress's conferral of a private right of action coupled with a right to judicial relief through statutory damages is sufficient to confer Article III standing without regard to actual injury. Indeed, the court of appeals expressly disclaimed any analysis of whether the alleged statutory violations in this case caused palpable injury or actual harm to Robins, such as "harm to his employment prospects or related anxiety." Pet. App. 9a n.3. Just as this Court has previously found plaintiffs' complaints lacking when they allege a bare violation of law that causes no actual harm, the Court should conclude here that Robins's bare allegation of a statutory violation, without more, is insufficient to confer Article III standing. *E.g.*, *Summers* v. *Earth Island Inst.*, 555 U.S. at 496 ("[D]eprivation of a procedural right without some concrete interest that is affected by the deprivation ... is insufficient to create Article III standing."); *Lujan* v. *Defenders of Wildlife*, 504 U.S. at 572 (procedural injury does not confer standing unless it also "impair[s] a separate concrete interest"); *Valley Forge*, 454 U.S. at 485 (plaintiffs' "claim that the Constitution has been violated" is insufficient to confer standing where plaintiff failed to "identify any personal injury suffered by them *as a consequence* of the alleged constitutional error").

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applied to state law claims alleging bare violations of state statutes with no allegation of actual harm, *see infra* pp.18-19, and therefore this Court's resolution of the Article III standing question presented in this case could have a profound impact on similar state law claims brought in federal courts.

B. The Article III Standing Requirement Protects The Separation Of Powers

The Ninth Circuit's unduly broad standing rule threatens to undermine the carefully calibrated separation of powers established by the Constitution. It has long been understood that "Art[icle] III standing is built on ... the idea of separation of powers." *Allen* v. *Wright*, 468 U.S. 737, 752 (1984); *see also Lexmark Int'l, Inc.* v. *Static Control Components, Inc.*, 134 S. Ct. 1377, 1386 (2014) (recognizing that standing doctrine derives from "separation-of-powers principles"). The Founders envisioned the federal judiciary as a forum of "'last resort'" to settle concrete disputes. *Allen*, 468 U.S. at 752. This Court has previously rejected the contention that private plaintiffs may "roam the country in search of ... wrongdoing" in order "to reveal their discoveries in federal court" because "[t]he federal courts were simply not constituted as ombudsmen of the general welfare." *Valley Forge*, 454 U.S. at 487. The power and responsibility to enforce the law belong to the political branches—in particular, the Executive Branch, upon which the Constitution confers the authority and obligation to ensure "that the Laws be faithfully executed." U.S. Const. art. II, § 3; *see also United States* v. *Raines*, 362 U.S. 17, 27 (1960).

In contrast, this Court's precedents explain that the judicial "power to declare the rights of individuals ... 'is legitimate only in the last resort, and as a necessity in the determination of real, earnest and vital controversy.'" *Valley Forge*, 454 U.S. at 471 (quoting *Chicago & Grand Trunk Ry. Co.* v. *Wellman*, 143 U.S. 339, 345 (1892)). The standing requirement limits the categories of litigants who may invoke the jurisdiction of the federal courts and thus "prevent[s] the judicial process from being used to usurp the powers of the politi-

cal branches." *Clapper* v. *Amnesty Int'l USA*, 133 S. Ct. 1138, 1146 (2013). Yet the Ninth Circuit's broad standing rule empowers private litigants to do just what this Court has prohibited—go out in search of potential violations of state and federal statutes in order to bring their claims in federal court.

This transfer of law enforcement power and authority from the Executive Branch to private litigants who allege no actual injury has important, negative consequences. Significantly, "[v]irtually none of the checks on executive enforcement discretion apply to private parties.... Nor are there political constraints." Grove, *Standing as an Article II Nondelegation Doctrine*, 11 U. Pa. J. Const. L. 781, 818 (2009); *see also id.* at 820 (explaining that while "the Executive Branch exercises considerable prosecutorial discretion in fulfilling its constitutional duty to enforce federal law," it is also "subject to a degree of judicial and congressional oversight"). The Ninth Circuit's rule transforms private litigants into roving attorneys general who operate with vastly different incentives than actual executive officials and a dearth of safeguards to constrain their conduct, and transforms the federal courts into quasi-administrative or advisory tribunals in which uninjured litigants seek to vindicate abstract legal rights.

II. Erosion Of The Injury-In-Fact Requirement Invites Abusive Litigation Against Technology Companies

A. Courts Following The Ninth Circuit's Reasoning Routinely Find Standing Based Solely On Alleged Injuries-In-Law

The Ninth Circuit's broad holding that any "alleged violation of ... statutory rights [is] sufficient to satisfy the injury-in-fact requirement of Article III" (Pet. App.

8a) broadly implicates numerous federal and state statutes that confer private rights of action and provide for statutory damages or other forms of relief regardless of demonstrated or alleged harm. By its reasoning and terms, the Ninth Circuit's rule—and similar rules adopted by other courts of appeals[7]—allows any plaintiff to invoke federal jurisdiction based on the allegation of a "colorable" statutory violation that causes no harm. In practice, this allows plaintiffs to pursue lawsuits seeking billions of dollars in statutory damages, sweeping injunctive relief, and even punitive damages based on novel legal theories or technical statutory violations that are not alleged to have "affect[ed] the plaintiff" or harmed anyone. *Lujan* v. *Defenders of Wildlife*, 504 U.S. at 560 n.1.

Due to the widespread adoption and use of the Internet-based services and related products that amici provide, amici interact with millions of individuals or more each day who use their services to conduct transactions, share information and content, and interact with people all over the world. Indeed, it is the very

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[7] For example, the Tenth Circuit has held that "[t]he actual or threatened injury required by Art[icle] III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing." *Day* v. *Bond*, 500 F.3d 1127, 1136 (10th Cir. 2007) (internal quotation marks omitted); *see also Shaw* v. *Marriott Int'l, Inc.*, 605 F.3d 1039, 1042 (D.C. Cir. 2010) ("[T]he violation of a statute can create the particularized injury required by Article III ... when 'an individual right' has been 'conferred on a person by statute.'"); *but see David* v. *Alphin*, 704 F.3d 327, 338 (4th Cir. 2013) (theory "that the deprivation of [plaintiffs'] statutory right is sufficient to constitute an injury-in-fact for Article III standing" "conflates statutory standing with constitutional standing"); *Kendall* v. *Employees Ret. Plan of Avon Prods.*, 561 F.3d 112, 121 (2d Cir. 2009) (breaches of statutory duty do not "in and of themselves constitute[] an injury-in-fact sufficient for constitutional standing").

efficiency and worldwide reach of amici's operations that enable them to deliver such enormous value at such low (sometimes no) cost to their users. At the same time, however, amici's huge volume of daily interactions with millions of different people renders them particularly vulnerable to putative class actions that allege bare statutory violations and claim statutory damages for enormous putative classes. Any process or practice that applies to a particular user of services or websites provided by any one of the amici may well be alleged to apply equally or similarly to many thousands or millions of other users.

With increasing frequency, amici and other technology companies have been named as defendants in suits brought under statutes that provide private rights of action coupled with the ability to obtain statutory damages. Among other statutes, plaintiffs have brought suit under the Wiretap Act (as amended by the Electronic Communications Privacy Act of 1986), 18 U.S.C. §§ 2510-2522,[8] the Stored Communications Act (SCA), *id.* §§ 2701-2712,[9] the Video Privacy Protection

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[8] The Wiretap Act provides a private right of action for "any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used" in violation of the Act, 18 U.S.C. § 2520(a), establishes "statutory damages of whichever is the greater of $100 a day for each day of violation or $10,000," *id.* § 2520(c)(2)(B), and allows plaintiffs to seek "a reasonable attorney's fee," *id.* § 2520(b)(3).

[9] The SCA provides a right of action to any "subscriber, or other person aggrieved" by a "knowing or intentional" violation of the Act, 18 U.S.C. § 2707(a), statutory damages of $1,000 for each plaintiff, *id.* § 2707(c), and the right to recover "a reasonable attorney's fee," *id.* § 2707(b)(3).

Act (VPPA), *id.* § 2710,[10] and the Telephone Consumer Protection Act (TCPA), 47 U.S.C. § 227.[11] In addition, amici and other technology companies often face claims brought under similar state statutes that also provide private rights of action combined with statutory damages. Claims under these state statutes can be brought in federal court based on diversity jurisdiction, 28 U.S.C. § 1332(a), supplemental jurisdiction, *id.* § 1367, or the Class Action Fairness Act, *id.* § 1332(d).

Under the Ninth Circuit's rule, plaintiffs are able to maintain these suits against amici and other technology companies despite their inability to allege any actual harm that would support standing. The suits typically are styled as putative class actions and seek millions or even billions of dollars in statutory damages based on allegations of technical or trivial statutory violations and/or novel, untested legal theories. Such suits for statutory damages are particularly attractive to the plaintiffs' class action bar because at least some courts have concluded that the pursuit of statutory damages based solely on an alleged injury-in-law effectively bypasses the strict commonality and typicality requirements that often preclude class certification in other contexts. *E.g.*, *Ramirez* v. *Trans Union, LLC*, 301

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[10] The VPPA provides a cause of action to "[a]ny person aggrieved by any act of a person in violation of [the Act]," 18 U.S.C. § 2710(c)(1), and entitles plaintiffs to seek statutory damages of $2,500, punitive damages, reasonable attorneys' fees, and equitable relief, *id.* § 2710(c)(2).

[11] The TCPA provides a cause of action "based on a violation of [the Act] or the regulations prescribed under [the Act]," 47 U.S.C. § 227(b)(3)(A), and entitles plaintiffs to seek statutory damages of $500 for each violation, *id.* § 227(b)(3)(B). The statutory damages may be trebled for willful or knowing violations of the Act. *Id.* § 227(b)(3).

F.R.D. 408, 419 (N.D. Cal. 2014) (explaining in typicality analysis that "as Plaintiff is seeking statutory damages and not actual damages, whether he was actually denied credit or received inferior credit terms ... is not at issue"); *Cobb* v. *Monarch Fin. Corp.*, 913 F. Supp. 1164, 1172 (N.D. Ill. 1995) ("[Plaintiff] ... seeks to recover statutory damages, a claim typical to the class."). The Ninth Circuit's failure to require an actual injury thus threatens to undermine the "stringent requirements for [class] certification that ... exclude most claims." *American Express Co.* v. *Italian Colors Rest.*, 133 S. Ct. 2304, 2310 (2013); *see also Comcast Corp.* v. *Behrend*, 133 S. Ct. 1426, 1432 (2013) (explaining that class actions are an "'exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only'"). Where the only injury alleged is an injury-in-law, the requirement of a common injury may no longer serve the intended gating function to limit the availability of the class action mechanism.

District courts in the Ninth Circuit now presume it to be settled law "that alleged colorable violations of the Wiretap Act and the SCA alone suffice ... to establish Article III standing without any independent showing of injury." *Perkins* v. *LinkedIn Corp.*, 53 F. Supp. 3d 1190, 1208 (N.D. Cal. 2014) (emphases added). In one suit, plaintiffs alleged that a software bug inadvertently resulted in the transmittal by a Facebook user's browser of "referrer headers" to advertisers that sometimes may have included a user's Facebook identification number or name when the user clicked on an advertisement on Facebook's website. *In re Facebook Privacy Litig.*, 791 F. Supp. 2d 705, 708-709 (N.D. Cal. 2011), *aff'd*, 750 F.3d 1098 (9th Cir. 2014). There was no allegation that any advertiser had ever actually received, much less used, the referrer header information

in any way, or that any user was actually harmed by the alleged disclosure. Nonetheless, the district court denied a motion to dismiss a complaint alleging violations of the Wiretap Act and seeking statutory damages, despite the plaintiffs' failure to allege any actual harm, because "Plaintiffs allege a violation of their statutory rights," which the court found "sufficient to establish that they have suffered the injury required for standing under Article III." *Id.* at 712.

Similarly, another suit claimed that amicus Google violated the SCA when it allegedly included user search queries in the URLs of Google search results pages, URLs that could in turn be transmitted (via "referrer headers") to a third-party landing site if and when the user clicked on a search result. *Gaos* v. *Google Inc.*, 2012 WL 1094646, at *1 (N.D. Cal. Mar. 29, 2012). According to the complaint, the "[s]earch terms *could* be linked together with the identity of the user," though there was no allegation that this had actually occurred. *Id.* (emphasis added). The district court denied Google's motion to dismiss the putative class complaint seeking statutory damages because "a plaintiff may be able to establish constitutional injury in fact by pleading a violation of a right conferred by statute" and "the SCA provides a right to judicial relief based only on a violation of the statute without additional injury." *Id.* at *3; *see also In re iPhone Appl. Litig.*, 844 F. Supp. 2d 1040, 1055 (N.D. Cal. 2012) ("Plaintiffs have alleged a violation of their statutory rights under the Wiretap Act ... as well as the [SCA] .... Thus, the Court finds that Plaintiffs have established injury in fact for the purposes of Article III standing.").

Other district courts have extended this misinterpretation of Article III to cases involving the TCPA and VPPA. Thus, a district court sustained a putative

class action brought under the TCPA where the defendant was alleged to have sent unauthorized text messages because merely "by alleging he received a text message in violation of the TCPA, [plaintiff] has established a particularized injury in satisfaction of Article III" even in the absence of an actual alleged injury-in-fact. *Smith* v. *Microsoft Corp.*, 2012 WL 2975712, at *6 (S.D. Cal. July 20, 2012).

Another district court sustained a putative class complaint under the VPPA despite the lack of any alleged actual injury. In that case, the plaintiffs alleged that Hulu, which provides online access to television shows, films, and other video content, had "wrongfully disclosed" anonymized information about users' viewing histories to a metrics company that Hulu had hired to analyze its audience and to Facebook, and that the metrics company and Facebook somehow might link this information to users' identity. *See In re Hulu Privacy Litig.*, 2014 WL 1724344, at *1-5 (N.D. Cal. Apr. 28, 2014). The court concluded that the case could proceed because plaintiffs need not "show actual injury that is separate from a statutory violation to recover ... liquidated [statutory] damages." *In re Hulu Privacy Litig.*, 2013 WL 6773794, at *4 (N.D. Cal. Dec. 20, 2013); *see also In re Hulu Privacy Litig.*, 2012 WL 2119193, at *8 (N.D. Cal. June 11, 2012) ("Plaintiffs establish an injury (and standing) by alleging a violation of a statute.").

District courts have also applied the Ninth Circuit's rule to allow cases alleging bare violations of state law to proceed. Thus a plaintiff has been found to have standing for a putative class claim alleging an injury-in-law under the Illinois Right of Publicity Act, 765 Ill. Comp. Stat. 1075/1 *et seq.*, which provides for statutory damages of $1,000 per violation and punitive damages for willful violations. *C.M.D.* v. *Facebook, Inc.*, 2014

WL 1266291, at *2-3 (N.D. Cal. Mar. 26, 2014). A plaintiff has been found to have standing based on the bare allegation that the defendant violated Michigan's Video Rental Privacy Act, Mich. Comp. Laws § 445.1712, which provides a private right of action and statutory damages of $5,000 per person along with the right to recover attorneys' fees and costs. *Deacon* v. *Pandora Media, Inc.*, 901 F. Supp. 2d 1166, 1171-1172 (N.D. Cal. 2012) (alleging that public and Facebook "friends" could see a user's music preferences). And a plaintiff has been found to have standing, based on allegations of injury-in-law alone, in a putative class action alleging violations of multiple state statutes that provide for statutory damages and injunctive relief. *Goodman* v. *HTC Am., Inc.*, 2012 WL 2412070, at *8 (W.D. Wash. June 26, 2012); *see also id.* at *1 (alleging that transmission of location data by AccuWeather applications installed in plaintiffs' smartphones "transform[s] the phones into surreptitious tracking devices").

B. The Ability To Seek Class-Wide Statutory Damages For Mere Injuries-In-Law Allows Plaintiffs To Extract *In Terrorem* Settlements

Erosion of the Article III standing requirement in this context and the corresponding inability of defendants to obtain dismissal of no-injury suits for lack of standing, combined with the widespread availability of statutory damages under many of these types of statutes, has led to abusive, costly class-action litigation against technology companies in the federal courts. Since any technology company practice that applies to a single user may often be replicated with respect to thousands or millions of other users each day, the potential class size in such lawsuits is enormous. Indeed,

it is the very success of technology companies that have developed valuable and efficient services that are used and accessed every day by millions of people, often at no or little cost to the user, that makes them especially vulnerable to such opportunistic suits. Of particular concern, the combination of potentially huge classes with the prospect of even modest per-plaintiff statutory damages presents a threat of absurdly high potential damages that can force *in terrorem* settlements of meritless, no-injury cases unless they can be dismissed at an early stage.

As the district court below recognized, if a mere statutory violation "confer[s] Article III standing ... where no injury in fact is properly pled," then "federal courts will be inundated by web surfers' endless complaints." Pet. App. 23a-24a. Unfortunately, the district court's prediction has already become reality—technology companies are routinely subjected to suits seeking billions (or even trillions) of dollars in damages for alleged statutory violations that are not alleged to have caused any actual harm to anyone. And the *in terrorem* effect of the damages exposure often leads to high-dollar settlements, even in the face of strong defenses.

For example, amicus Facebook settled a putative class action complaint alleging violations of a state statute in which the proposed settlement class "consist[ed] of some 150 million members" of Facebook's social network. *Fraley* v. *Facebook, Inc.*, 966 F. Supp. 2d 939, 940 (N.D. Cal. 2013). The complaint alleged that Facebook misappropriated users' names and likenesses in alleged advertisements displayed to their friends on Facebook (the *same* friends with whom these users had chosen already to share the *same* information). *Id.* at 942. The district court explained that "[w]hile plaintiffs

pleaded a sufficient basis for injury to support constitutional standing, it [was] far from clear that they could ever have shown they were actually harmed in any meaningful way." *Id.* The district court also noted "the theoretical availability of statutory damages of $750 per violation" under state law, yielding exposure to potential statutory damages that would "threaten Facebook's existence." *Id.* at 944 & n.4. The court approved a $20 million settlement, of which the plaintiffs' attorneys would receive 25 percent after payment of administration expenses, costs, and incentive awards of $1,500 to each named plaintiff. *Fraley* v. *Facebook, Inc.*, 2013 WL 4516806, at *1-4 (N.D. Cal. Aug. 26, 2013).

Similarly, amicus Netflix recently entered into a settlement with a class estimated to exceed 60 million individuals in a lawsuit alleging that it had unlawfully disclosed personal information to analytics companies hired by Netflix and impermissibly retained viewing information in violation of the VPPA. *In re Netflix Privacy Litig.*, 2013 WL 1120801, at *4-5 (N.D. Cal. Mar. 18, 2013). There was no allegation of actual harm, and the plaintiffs themselves estimated that their "'unlawful disclosure' claim would have a 5% chance of success on the merits." *Id.* The district court noted that Netflix had "potentially potent defenses" on all claims and might receive a "dismissal upon a dispositive motion." *Id.* at *5. But the potential statutory damages exceeded $150 *billion* and the case was settled for $9 million, of which $2.25 million went to class counsel and $30,000 went to the named plaintiffs. No other class members received any monetary compensation. *Id* at *1-2.

Likewise, amicus Google recently entered into a settlement of claims brought under the SCA on behalf

of a class estimated to "comprise[] ... approximately 129 million individuals." *In re Google Referrer Header Privacy Litig.*, 2015 WL 1520475, at *2 (N.D. Cal. Mar. 31, 2015); *see also supra* p.17 (describing facts of same case, which was captioned *Gaos* v. *Google Inc.* before consolidation). The court had previously noted that "the full amount of statutory damages ... is likely in the *trillions* of dollars considering the size of the class." *In re Google Referrer Header Privacy Litig.*, 2014 WL 1266091, at *5 n.4 (N.D. Cal. Mar. 26, 2014) (emphasis added). The case was settled for $8.5 million, despite the plaintiffs' concession that "the alleged privacy violation underlying all of their claims is novel and was potentially one of first impression in th[e] circuit," and the district court's conclusion that "there was no guarantee that any claims would survive pre-trial challenges." *In re Google*, 2015 WL 1520475, at *5. The plaintiffs' attorneys received $2.125 million, an estimated $1 million will go to administrative costs, the representative plaintiffs will each receive $5,000, and the balance of the fund will go to various *cy pres* recipients. None of the other class members received any monetary compensation. *Id.* at *4.

Amicus Facebook settled another putative class action alleging violations of the VPPA and Wiretap Act in which the class was estimated to exceed 3.6 million people, none of whom alleged any actual injury. *Lane* v. *Facebook, Inc.*, 2010 WL 9013059, at *2 (N.D. Cal. Mar. 17, 2010). The district court acknowledged that "Plaintiffs' claims raise novel legal theories" and that the case's "outcome ... would have been uncertain." *Id.* at *4. However, the plaintiffs sought $2,500 per alleged violation of the VPPA and $10,000 per alleged violation of the Wiretap Act, putting the defendants' potential liability exposure in the billions of dollars. *Id.* at *2.

The court approved a $9.5 million settlement, of which $3 million went to plaintiffs' attorneys' fees, administrative costs, and incentive payments to class representatives. *Lane* v. *Facebook, Inc.*, 696 F.3d 811, 817 (9th Cir. 2012).

Finally, amicus Google recently settled a putative class action brought under the TCPA, in which the class was estimated to include the holders of more than 185,000 unique telephone numbers, making the potential statutory damages exposure at least $200 million. Final Judgment Order 4-5, Dkt. 107, *Pimental* v. *Google Inc.*, No. 11-cv-2585 (N.D. Cal. June 26, 2013). The only "injury" alleged in the suit was receipt of a text message, and Google noted that all recipients were either members of the challenged text-messaging service that facilitated the text or had provided their phone number to the member who sent the text. *Pimental* v. *Google, Inc.*, 2012 WL 1458179, at *1 (N.D. Cal. Apr. 26, 2012). The parties settled for $6 million, of which $1.5 million went to attorneys' fees, $5,000 went to the named plaintiffs, and the balance went into a settlement fund that would be disbursed to *cy pres* recipients if funds went unclaimed. *Pimental*, Final Judgment Order 4-5, 7.

These examples offer a disturbing commentary on the consequences of the Ninth Circuit's no-injury standing jusrisprudence and the readiness of the class-action plaintiffs' bar to exploit it with opportunitistic lawsuits. Plaintiffs' ability to file these types of cases based on alleged injuries-in-law without identifying any one who has suffered any actual harm has an extreme and chilling effect on technology companies including amici. Perversely, the primary consequences of the expensive litigation and resulting *in terrorem* settlements of these no-injury controversies are the diversion of re-

sources away from technology companies' efforts to develop and provide increasingly innovative services and products to the users who often comprise the putative classes in these cases. Thus, at least in the Internet-based technology sector represented by amici, the ultimate losers under the Ninth Circuit's standing ruling may be members of the vast consuming public, who now or in the future may face limited or more costly access to these highly beneficial services and products that they now often receive for free or at very low cost.

III. The Executive Branch Can And Does Act On Bare Statutory Violations And Private Litigants May Vindicate Legal Rights Where Actual Harm Occurs

There is no need for private federal lawsuits, brought by litigants who allege no actual injury, to ensure that these statutes are given their full force and effect. Executive officials routinely exercise their considerable authority to enforce statutes like the FCRA, the Wiretap Act, the SCA, and the TCPA. Accordingly, the Executive Branch can be reasonably expected to scrutinize business activity for compliance with the obligations imposed by these statutes.

The agencies charged with enforcing the FCRA regularly enforce its provisions against a variety of different companies. *E.g.*, Order, Dkt. 5, *United States* v. *Instant Checkmate, Inc.*, No. 14-cv-675 (S.D. Cal. Apr. 1, 2014) (consent agreement with FTC imposing $525,000 fine and injunctive relief for FCRA violations); Stipulated Final J., Dkt. 3, *United States* v. *Infotrack Info. Servs., Inc.*, No. 14-cv-2054 (N.D. Ill. Mar. 25, 2014) (consent agreement with FTC imposing $1 million fine and injunctive relief for FCRA violations); Order, *In re DriveTime Automotive Group, Inc.*, No. 2014-17

(CFPB Nov. 19, 2014) (consent order imposing $8 million fine and injunctive relief for violations of the FCRA and other statutes).

The FTC has recently entered into consent agreements with various technology companies alleged to have committed privacy violations. *E.g.*, Order, *In re Snapchat, Inc.*, No. 132-3078 (FTC May 8, 2014) (proposed consent agreement regarding alleged privacy violations by Snapchat application); Order, *In re Goldenshores Techs., LLC*, No. 132-3087 (FTC Dec. 5, 2013) (consent agreement regarding alleged privacy violations by creator of popular flashlight smartphone application); Consent Decree, Dkt. 8, *United States* v. *Path, Inc.*, 13-cv-448 (N.D. Cal. Feb. 8, 2013) (consent agreement regarding alleged privacy violations by a social networking application). In total, the FTC has brought more than 170 enforcement actions related to privacy since 1997, including 60 separate actions from 2012-2014. Solove & Hartzog, *The FTC and the New Common Law of Privacy*, 114 Colum. L. Rev. 583, 600 (2014); FTC, *Legal Resources*, *available at* https://www.ftc.gov/tips-advice/business-center/legal-resources (search "TYPE=Case" and "TOPIC=Privacy and Security" for each year) (last visited July 8, 2015). In light of the significant influence the FTC exerts in privacy regulation, scholars have concluded that "the FTC has become the dominant enforcer of privacy" rights in America. Solove & Hartzog, 114 Colum. L. Rev. at 602.

And the TCPA is routinely enforced by the FCC, which has levied significant fines on violators. *E.g.*, Forfeiture Order, *In re Security First of Ala., LLC*, No. 12-258 (FCC Feb. 13, 2015) (imposing $342,000 fine for TCPA violations); Notice of Apparent Liability, *In re Dialing Servs., LLC*, No. 12-1812 (FCC May 8, 2014)

(proposing $2.9 million fine for TCPA violations); Forfeiture Order, *In re Presidential Who's Who, Inc.*, No. 12-217 (FCC Mar. 28, 2014) (proposing $640,000 fine for TCPA violations).

While executive enforcement of these and similar statutes is robust, it bears noting that private litigants who are *actually injured* are also entitled to bring claims under these statutes. Moreover, these statutes provide individual litigants with numerous tools to ensure that they are incentivized and able to vindicate their statutory rights. The Wiretap Act, SCA, VPPA, and TCPA all provide for injunctive relief. 18 U.S.C. § 2520(b)(1); *id.* § 2707(b)(1); *id.* § 2710(c)(2)(D); 47 U.S.C. § 227(b)(3)(A). The VPPA and TCPA provide for enhanced damages. 18 U.S.C. § 2710(c)(2)(B); 47 U.S.C. § 227(b)(3). And the Wiretap Act, SCA, and VPPA provide for attorneys' fees. 18 U.S.C. § 2520(b)(3); *id.* § 2707(b)(3); *id.* § 2710(c)(2)(C). This Court has long recognized that the availability of attorneys' fees alone provides a strong incentive for litigants to pursue important public interest litigation. *Newman* v. *Piggie Park Enters., Inc.*, 390 U.S. 400, 402 (1968) ("Congress ... enacted the provision for counsel fees ... to encourage individuals *injured* by racial discrimination to seek judicial relief under Title II." (emphasis added)); *see also Boggs* v. *Alto Trailer Sales, Inc.*, 511 F.2d 114, 118 (5th Cir. 1975) (recognizing the incentive to bring individual claims when "each claimant is provided with reasonable attorney's fees and costs"); *Rowden* v. *Pacific Parking Sys., Inc.*, 282 F.R.D. 581, 586 (C.D. Cal. 2012) (recognizing that the availability of attorneys' fees and punitive damages "give individuals truly harmed by a [statutory] violation a more than sufficient incentive to bring an action even if the amount of recovery is difficult to quantify or relatively small");

Kline v. *Security Guards, Inc.*, 196 F.R.D. 261, 274 (E.D. Pa. 2000) ("[T]he very purpose of a fee-shifting statute such as the one at issue here is to provide incentive to counsel to pursue otherwise unprofitable litigation."). Accordingly, fidelity to Article III's injury-in-fact requirement will still leave private litigants harmed by statutory violations with strong incentives and numerous remedies to enforce their rights when violations cause real harm and the federal judicial power may be properly invoked.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted.

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REPLY BRIEF

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IN THE

Supreme Court of the United States

SPOKEO, INC.,

Petitioner,

v.

THOMAS ROBINS, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* ELECTRONIC PRIVACY INFORMATION CENTER (EPIC) AND THIRTY-TWO TECHNICAL EXPERTS AND LEGAL SCHOLARS IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

Interest of the *Amici Curiae* 1

Summary of the Argument 4

Argument 5

I. Americans Face Unprecedented Threats to Personal Privacy 5

A. Identity Theft and Consumer Fraud Have Skyrocketed as Data Brokers Put Consumers' Personal Information at Risk .. 6

B. Data Brokers Sell Consumer Profiles on Millions of Americans Without Verifying the Accuracy or Completeness of the Records ... 9

II. Privacy Laws Establish Individual Rights for Data Subjects and Impose Legal Obligations on Data Processors 12

III. In Privacy Cases, Plaintiffs Have Standing When a Company Misuses Their Personal Information in Violation of Federal Law 19

Conclusion 23

TABLE OF AUTHORITIES

CASES

Bartnicki v. Vopper, 532 U.S. 514 (2001) (Rehnquist, C.J., dissenting) 5, 17

Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982) 15, 20

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Massachusetts v. EPA, 549 U.S. 497 (2007) 19

Safeco Ins. Co. of America v. Burr, 551 U.S. 47 (2007) 14, 15

Warth v. Seldin, 422 U.S. 490 (1975) 19

Zivotofsky v. Kerry, 135 S. Ct. 2076 (2015) 15

STATUTES

Cable Communications Policy Act, 47 U.S.C. § 551(a) (2012) 21

Consumer Credit Reporting Reform Act of 1996, Pub. L. No. 104-208, Div. A., Title II, Subtitle D, § 2412(b), 110 Stat. 3009–446 (1996) (codified at 15 U.S.C. § 1681n(a)(1)(A)) 12

Driver's Privacy Protection Act, 18 U.S.C. § 2721 (2012) 21

Electronic Communications Privacy Act, 18 U.S.C. § 2520 (2012) 21

Fair and Accurate Credit Transactions Act, 15 U.S.C. § 1681b (2012) 21

15 U.S.C. § 1681w(a) 21

Fair Credit Reporting Act, 15 U.S.C. §§ 1681–1681x (2012) 15

15 U.S.C. § 1681(b) 15

15 U.S.C. § 1681e(b) 14

15 U.S.C. § 1681m(a) 15

Fair Debt Collection Practices Act, 15 U.S.C. § 1692c (2012) 21

Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. 90-351, § 801, 82 Stat. 197 16

Privacy Act of 1974, 5 U.S.C. § 552a (2012) 13

Right to Financial Privacy Act , 12 U.S.C. § 3402 (2012) 22

Telephone Consumer Protection Act, 47 U.S.C. § 227(b) (2012) 22

Video Privacy Protection Act of 1988, 18 U.S.C. § 2710 ..... 12, 22

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Peter Lattman, *ChoicePoint Settles with FTC*, Wall St. J. (Jan. 27, 2006) 7

Pricing, BrandYourself 11

Pricing, Trackur (2014) 11

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Symantec, *Internet Security Threat Report* (2015) 8

U.S. Dep't. of Health, Education and Welfare, Secretary's Advisory Committee on Automated Personal Data Systems, *Records, Computers, And The Rights of Citizens* (1973) 13, 14

INTEREST OF THE *AMICI CURIAE*

The Electronic Privacy Information Center (EPIC) is a public interest research center in Washington, D.C.[1] EPIC was established in 1994 to focus public attention on emerging civil liberties issues and to protect privacy, the First Amendment, and other constitutional values.[2]

EPIC routinely participates as *amicus curiae* before this Court in cases concerning emerging privacy and civil liberties issues: *See, for example, City of Los Angeles, California v. Patel*, 135 S. Ct. 2443 (2015), *Riley v. California*, 134 S. Ct. 2473 (2014); *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011); *Doe v. Reed*, 561 U.S. 186 (2010); *Hiibel v. Sixth Judicial Dist. Ct. of Nevada, Humboldt County*, 542 U.S. 177 (2004); *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Stratton, Ohio*, 536 U.S. 150 (2002).

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[1] Both parties consent to the filing of this brief. In accordance with Rule 37.6, the undersigned states that no monetary contributions were made for the preparation or submission of this brief, and this brief was not authored, in whole or in part, by counsel for a party.

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SUMMARY OF THE ARGUMENT

Consumers in the United States today face unprecedented threats of financial fraud and identity theft arising from the misuse of their personal information. The newspapers are filled with reports of data breaches and identity theft. Nearly every adult in the United States with a credit card has received a notification that their account has been hacked, and advised to sign up for "credit monitoring" services. Consumers routinely report to the Federal Trade Commission that identity theft is their top concern.

Anticipating that the collection and use of personal data in the modern economy would pose enormous risks to privacy, Congress enacted laws that establish rights for individuals and imposed obligations on the companies that profit from the collection and use of this data. This case presents a critical issue for the future of privacy in the United States—whether individuals whose personal information was misused by a firm in violation of an Act of Congress must also show an additional harm to seek redress. The defendant seeks to impose special pleading requirements on plaintiffs by requiring that they prove damages at the outset to establish the court's jurisdiction. That requirement is contrary to the Court's jurisprudence concerning the Article III "case and controversy" requirement, and it would remove the keystone of the Fair Credit Reporting Act and other privacy statutes—the ability

of consumers to seek redress when a company fails to safeguard their personal information as required by Congress.

ARGUMENT

I. Americans Face Unprecedented Threats to Personal Privacy

This is not the time for the Supreme Court to limit the ability of individuals to seek redress for violations of privacy rights set out by Congress. Americans consumers today face an epidemic of privacy harms, including data breaches, identity theft, and financial fraud. Many consumers are unable to obtain jobs or credit because of inaccurate or incomplete information made available by data brokers. These harms arise directly from the failure of companies that profit from the collection and use of the personal information of others to comply with the laws established by Congress to safeguard privacy. The willful violation of these laws threatens the economic and social opportunities of respondent Robins and millions of Americans consumers, whose personal information is collected and used by firms without their knowledge or consent. As Chief Justice Rehnquist warned, "All too often the invasion of privacy itself will go unknown. Only by striking at all aspects of the problem can privacy be adequately protected." *Bartnicki v. Vopper*, 532 U.S. 514, 549 (2001) (Rehnquist, C.J., dissenting).

A. Identity Theft and Consumer Fraud Have Skyrocketed as Data Brokers Put Consumers' Personal Information at Risk

For the fifteenth consecutive year, identity theft is the number one complaint among American consumers. Fed. Trade Comm'n, *Consumer Sentinel Network Data Book* 3 (2015). According to the most recent Department of Justice report, more than sixteen million Americans were the victims of identity theft in 2012 alone. *See* Erika Harrell, Ph.D. & Lynn Langton, Ph.D., Bureau of Justice Statistics, *Victims of Identity Theft* 1 (Dec. 12, 2013). That year, identity theft cost American consumers more than twenty-four billion dollars, ten billion more than the losses attributed to all other property crimes. *Id.* at 6 (outpacing fourteen billion in losses from burglary, automobile theft, and theft).[3]

As data brokers gather and store sensitive consumer data, the risk of data breaches necessarily increases. These valuable troves of personal information attract "identity thieves and other unscrupulous actors" to "the collection of consumer profiles that would give them a clear picture of consumers' habits over time, thereby enabling them to predict passwords, challenge questions, or other authentication credentials." Fed. Trade Comm'n, *Data Brokers: A Call for Transparency and*

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[3] *Available at* http://www.bjs.gov/content/pub/pdf/vit12.pdf.

Accountability vi (2014) [hereinafter "FTC Data Broker Report"].[4]

In some instances, data brokers engage in practices that contribute directly to fraud and theft. The FTC determined that the data broker ChoicePoint had sold consumer profiles to identity thieves. *See* Stipulated Final J. and Order for Civil Penalties, Permanent Inj., and Other Equitable Relief, *United States v. ChoicePoint Inc.*, Feb. 15, 2006. The company caused so much damage that it paid, at the time, the largest fine in the FTC's history. Peter Lattman, *ChoicePoint Settles with FTC*, Wall St. J. (Jan. 27, 2006). Significantly, ChoicePoint's debacle was not an isolated incident. Subsequent reports revealed that the company also sold similar information on seven thousand people to identity thieves in 2002 with losses over one million dollars. David Colker & Joseph Menn, *ChoicePoint CEO Had Denied Any Previous Breach of Database*, L.A. Times (March 3, 2005).[5] *See also Identity Theft and Data Broker Services: Hearing Before the S. Comm. on Commerce, Sci., and Transp.*, 109th Cong. 1 (2005) (statement of Marc Rotenberg, Exec. Dir., EPIC).

Data breaches are on the rise. From 2013 to 2014, data breaches increased by twenty-three

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[4] *Available at* https://www.ftc.gov/system/files/documents/reports/data-brokers-call-transparency-accountability-report-federal-trade-commission-may-2014/140527databrokerreport.pdf.

[5] http://articles.latimes.com/2005/mar/03/business/fi-choicepoint3.

percent. Symantec, *Internet Security Threat Report* 78 (2015).[6] In 2014 there were four "mega breaches," resulting in the exposure of "at least ten million" different individuals' personal data. *Id.* Those breaches exposed hundreds of millions of records, including names, birth dates, social security numbers, addresses, medical records, phone numbers, financial information, e-mail addresses, user names and passwords, and insurance information. *Id.* at 83.

Data breaches in 2015 have already exposed more than one hundred and forty million records of personally identifiable information. Identity Theft Res. Ctr., *Data Breach Reports* 5 (Aug. 25, 2015) (defining a data breach as "an incident in which an individual name plus a Social Security number, driver's license number, medical record or financial record (credit/debit cards included) is potentially put at risk because of exposure").[7] *See also Is the OPM Data Breach the Tip of the Iceberg?: Hearing Before the H. Comm. on Sci., Space, & Tech.*, 114th Cong. (2015) (statement of Chairman Lamar Smith (R-Tx)) ("National defense in the digital age no longer just means protecting ourselves against enemies who attack with traditional weapons. It now means protecting America from those who launch cyber-attacks against our computers and networks,

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[6] *Available at* https://www4.symantec.com/mktginfo/whitepaper/ISTR/21347932_GA-internet-security-threat-report-volume-20-2015-social_v2.pdf.

[7] *Available at* http://www.idtheftcenter.org/images/breach/DataBreachReports_2015.pdf.

invading our privacy and probably endangering lives.").

Data breaches were "one of the main sources of fraud last year," and a recent report found that "one in three people who received notifications of a data breach" have discovered that they were subject to fraud. Blake Ellis, *Identity Fraud Hits New Victim Every Two Seconds*, CNN Money (Feb. 6, 2014).[8] Surveys indicate that more than forty percent of Americans have "experienced some form of payment card fraud in the last five years." *Skimming Off the Top*, Economist (Feb. 5, 2014).[9] The costs of these breaches have increased exponentially over the last few decades, and data brokers contribute to the problem by failing to follow their statutory obligations.

B. Data Brokers Sell Consumer Profiles on Millions of Americans Without Verifying the Accuracy or Completeness of the Records

Data brokers quantify, collect, and sell data on nearly every aspect of modern life. One company's database contains information on "1.4 billion consumer transactions and over 700 billion aggregated data elements." FTC Data Broker Report at 46. Starting with basic data elements such as name, gender, ethnicity, and income, data brokers make significant inferences about consumers. *Id.* at

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[8] http://money.cnn.com/2014/02/06/pf/identity-fraud/.

[9] http://www.economist.com/news/finance-and-economics/21596547-why-america-has-such-high-rate-payment-card-fraud-skimming-top.

iv–v ("Potentially sensitive categories include those that primarily focus on ethnicity and income levels, such as 'Urban Scramble' and 'Mobile Mixers,' both of which include a high concentration of Latinos and African Americans with low incomes."). "The ability of a company—a company that you have no relationship with—to know where you live, your demographics, your interests, and how to contact you is unprecedented." Jeff Jonas, *The Surveillance Society and Transparent You, in Privacy in the Modern Age: The Search for Solutions* 93, 98 (Marc Rotenberg, Julia Horwitz, & Jeramie Scott eds., 2015).

Precautionary and remedial measures also impose heavy costs on consumers. *See* Frank Pasquale, *We're Being Stigmatized by 'Big Data' Scores We Don't Even Know About*, L.A. Times (Jan 15, 2015) ("Naturally, just as we've lost control of data, a plethora of new services offer 'credit repair' and 'reputation optimization' to remedy the stigmatization of secret digital judgments.").[10] For example, credit repair companies charge initial fees ranging from $49 to $99 in addition to monthly payments. *See How Much Do Credit Repair Services Cost?*, Lexington Law (2015).[11] But a credit repair

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[10] http://www.latimes.com/opinion/op-ed/la-oe-0116-pasquale-reputation-repair-digital-history-20150116-story.html.

[11] https://www.lexingtonlaw.com/faq/costs. *See also Credit Repair*, Sky Blue Credit Repair, https://www.skybluecredit.com (last visited July 2, 2015); *How It Works*, Ovation (2015), http://www.ovationcredit.com/WhatWeDo (last visited July 2, 2015).

service is not a guaranteed fix of a credit score. The National Association of Insurance Commissioners reports that the typical cost of identity theft insurances ranges from $25 to $60 per year. *A Rise in Identity Theft Spurs New Type of Insurance*, Nat'l Ass'n of Ins. Comm'rs (Sept. 2009).[12] Online reputation management services can cost between $250 and $8000 initially plus monthly maintenance charges, which can range from $20 to upwards of $2000 per month. *See Pricing*, BrandYourself;[13] *How Reputation Management Works*, Reputation.com (2015).[14] Social media monitoring software can cost a consumer between $100 and $500 per month. *Pricing*, Trackur (2014).[15]

Although the total impact of inaccurate reports, data breaches and identity theft in the United States is staggering, the ability for an individual to prove harm is particularly difficult.. Unlike physical crimes, harms arising from inadequate data protection are often concealed. *See, e.g., Law Enforcement*, Identity Theft Res. Center (last visited Sept. 3, 2015) ("Most identity theft crimes are multi-jurisdictional, time consuming, and difficult to solve.").[16] In addition, the harms caused

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[12] http://www.naic.org/documents/consumer_alert_idtheft.htm.

[13] https://brandyourself.com/info/about/howItWorks/headStart (last visited July 2, 2015).

[14] http://www.reputation.com/personal/how-reputation-management-works (last visited July 2, 2015).

[15] http://www.trackur.com/options.

[16] http://www.idtheftcenter.org/id-theft/law-enforcement.html.

by such privacy violations are not easily quantified, though the consequences of a lost job, the weeks spent fixing an inaccurate credit report, or changing credit cards are very real.

Well aware of the enormous challenge of safeguarding privacy in the modern age, Congress has enacted laws that impose obligations on commercial firms to minimize the risk of the misuse of personal information and provided for statutory damages when companies fail to comply with these requirements. *See, e.g.*, Consumer Credit Reporting Reform Act of 1996, Pub. L. No. 104-208, Div. A., Title II, Subtitle D, § 2412(b), 110 Stat. 3009–446 (1996) (codified at 15 U.S.C. § 1681n(a)(1)(A)) (amending FCRA to include a statutory damages provision); Video Privacy Protection Act of 1988, Pub. L. No. 100-618, 102 Stat. 3195 (codified at 18 U.S.C. § 2710). Congress has recognized that consumers cannot be expected to wait until after they suffer monetary damage to seek redress for a company's failure to meet its privacy obligations.

II. Privacy Laws Establish Individual Rights for Data Subjects and Impose Legal Obligations on Data Processors

Modern privacy laws, such as the Fair Credit Reporting Act, place obligations on companies that collect personal information and give rights to individuals whose information is collected and disseminated. The allocation of responsibilities and rights is sensible, particularly because the entity in possession of the data that controls its subsequent use. It is economically efficient for the entity in possession of personal data to bear the consequences for its subsequent misuse.

The rights and responsibilities that provide the basis of privacy laws have come to be known as "Fair Information Practices" ("FIPs"). *See* EPIC, *The Code of Fair Information Practices.*[17] "Fair information Practices provide the central conceptual framework for privacy rights in the digital age." Marc Rotenberg, *EPIC: The First Twenty Years, in Privacy in the Modern Age: The Search for Solutions* 1, 5 (Marc Rotenberg, Julia Horwitz, & Jeramie Scott eds., 2015). The Privacy Act of 1974, 5 U.S.C. § 552a (2012), incorporated the FIPs as outlined by the HEW Report in 1973, *see* U.S. Dep't. of Health, Education and Welfare, Secretary's Advisory Committee on Automated Personal Data Systems, *Records, Computers, And The Rights of Citizens* (1973), and this structure has been adopted in every major privacy law. The FIPs include five obligations for all organizations that collect personal data:

1. There must be no personal data record-keeping systems whose very existence is secret.
2. There must be a way for a person to find out what information about the person is in a record and how it is used.
3. There must be a way for a person to prevent information about the person that was obtained for one purpose from being used or made available for other purposes without the person's consent.
4. There must be a way for a person to correct or amend a record of identifiable information about the person.

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[17] http://epic.org/privacy/consumer/code_fair_info.html.

5. Any organization creating, maintaining, using, or disseminating records of identifiable personal data must assure the reliability of the data for their intended use and must take precautions to prevent misuses of the data.

Id. at viii. These obligations are central for the data broker industry, where "it would be impractical to premise data collection and use based solely on traditional implementations of notice and choice." Christopher Wolf, *Envisioning Privacy in the World of Big Data, in Privacy in the Modern Age: The Search for Solutions* 204, 205 (Marc Rotenberg, Julia Horwitz, & Jeramie Scott eds., 2015).

Congress passed the FCRA to make clear the fiduciary duties that arise from the decision of companies to profit from the collection and use of personal information. As this Court recently explained, "Congress enacted FCRA in 1970 to ensure fair and accurate credit reporting, promote efficiency in the banking system, and protect consumer privacy." *Safeco Ins. Co. of America v. Burr*, 551 U.S. 47, 52 (2007). The rights set out in the FCRA and other privacy laws arise directly from these fiduciary responsibilities established by Congress.

For example, FCRA not only limits the disclosure of information contained in credit reports, but it also places on the credit reporting agency an obligation to ensure that the information is correct and timely, 15 U.S.C. § 1681e(b) (2012), and it provides the subject of the credit report the opportunity to inspect the record and correct it if necessary, § 1681g. The law also requires that "any person [who] takes any adverse action with respect to

any consumer that is based in whole or in part on any information contained in a consumer report" must notify the affected consumer. *Safeco*, 551 U.S. at 53 (citing 15 U.S.C. § 1681m(a) (2012)).

These responsibilities help ensure that data collectors use personal information for its intended purposes and that financial institutions base determinations, such as whether a person qualifies for a car loan or can obtain a home mortgage, are based on accurate information. *See* 15 U.S.C. § 1681(b) (2012) (defining the purpose of the FCRA as "requiring that consumer reporting agencies adopt reasonable procedures" to ensure that credit reporting is "fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization" of consumer information). When the Court in *Safeco* articulated the rights and obligations created by the FCRA, it never questioned the standing of an individual to bring suit based on the violation of those rights.[18]

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[18] If the Court were to adopt the test that Spokeo proposes in this case, it would have to reconsider all prior opinions in which it presumed standing for claims based on the violation of a legally protected interest without any proof of consequential harm. *See, e.g.*, *Zivotofsky v. Kerry*, 135 S. Ct. 2076 (2015) (considering a challenge brought by a minor child for declaratory and injunctive relief based on a challenge to the listed place of birth on his U.S. passport); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 374 (1982) (upholding the right of Fair Housing Act testers to receive "truthful information concerning the availability of housing," even in the absence of further harm).

Congress also established individual rights to deter the collection or disclosure of personal information by unknown third parties, which would violate an individual's privacy. For example, in the Wiretap Act, 18 U.S.C. §§ 2510–22 (2006), the injury occurs with the "interception" of a "wire, oral, or electronic communication." *Id.* § 2511(1)(a)–(e). The harm is the unlawful intrusion itself, irrespective of any subsequent or consequential damages. Congress passed the Wiretap Act to remedy "extensive wiretapping carried on without legal sanctions, and without the consent of any of the parties to the conversation." Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. 90-351, § 801, 82 Stat. 197, 211. The class of persons entitled to sue consists only of those who have suffered the injury: "any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used" in violation of the Act. 18 U.S.C. § 2520(a) (2006).

At the time of the introduction of the Video Privacy Protection Act in 1988, Senator Chuck Grassley explained the important interests served by federal privacy laws:

> Privacy is something we all value. The right of privacy is not, however, a generalized undefined right. It is a specific right, one which individuals should understand. And it is the role of the legislature to define, expand, and give meaning to the concept of privacy.

134 Cong. Rec. 5400–01 (May 10, 1988).

When it enacted the FCRA, Congress provided for statutory remedies to ensure protection of personal data. The need for statutory remedies is

due, in part, to the complicated nature of harms resulting from privacy violations. Echoing the views expressed by Chief Justice Rehnquist in *Bartnicki v. Vopper*, 532 U.S. 514, 549 (2001) (Rehnquist, C.J., dissenting), privacy scholars have explained why the harms resulting from privacy invasions are especially difficult to quantify and trace. The underlying interests protected by federal privacy laws are as complex and varied as they are important.

Privacy rights serve at least three separate purposes. First, privacy helps individuals avoid the embarrassment that accompanies the disclosure of certain personal details. Second, privacy helps to preserve human dignity, respect, and autonomy. Finally, privacy helps individuals construct intimacy with others. Jerry Kang, *Information Privacy in Cyberspace Transactions*, 50 Stan. L. Rev. 1193, 1212–16, 1260 (1998).

Privacy violations negatively impact the lives of Americans, and the "embarrassment that results from privacy incursions is uniquely detrimental to humans, with irreparable effects on individuals." Ann Bartow, *A Feeling of Unease About Privacy Law*, 155 U. Pa. L. Rev. 52 (2007). Cognitive psychology research also demonstrates that embarrassment from lack of privacy stunts social development and growth, neither of which is fungible or replaceable in human beings. *See* Julie E. Cohen, *Examined Lives: Informational Privacy and the Subject as Object*, 52 Stan. L. Rev. 1373, 1425 n.195 (2000).

The exposure or misuse of privacy information also "poses special threats to individuals' ability to structure their lives in unconventional ways." Jeffrey Rosen, *The Purposes of Privacy: A Response*, 89 Geo.

L.J. 2117, 2121 (2001). Privacy further enables personal autonomy and freedom:

> [I]nsofar as privacy, understood as a constraint on access to people through information, frees us from the stultifying effects of scrutiny and approbation (or disapprobation), it contributes to material conditions for the development and exercise of autonomy and freedom in thought and action.

Helen Nissenbaum, *Privacy in Context: Technology, Policy, and the Integrity of Social Life* 82 (2010).

The interests of personal autonomy, dignity, and freedom are especially important values in American law. "Even in a world in which, thanks to technology, acquiring knowledge about others is virtually effortless, personal autonomy must be respected." Francesca Bignami, *The Case for Tolerant Constitutional Patriotism: The Right to Privacy Before the European Courts*, 41 Cornell Int'l L.J. 211, 223 (2008). Personal autonomy "concerns the individuals' ability to maintain a sphere of immunity from social norms and regulations." Jeffrey Rosen, *The Purposes of Privacy: A Response*, 89 Geo. L.J. 2117, 2121 (2001). Privacy interests are not only essential to freedom and autonomy, they go to the core of self definition.

Privacy laws in the United States protect individuals from a wide range of harms, including intrusions upon their physical, informational, decisional, proprietary, and associational interests. Anita L. Allen & Marc Rotenberg, *Privacy Law And Society* ___ (2016) (forthcoming). These intrusions

might be intentional or mistaken; they might be caused by government or private organizations. Freedom from such intrusions serves to foster a free and open society, promote human dignity and individuality, and limit threats to individual autonomy. *Id.* at 7 (summarizing values as described in privacy literature).

The individual rights set out in the FCRA and other federal privacy laws are not the administrative schemes outlined in the Endangered Species Act. In *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), the Court found that plaintiffs did not have standing based on a provision giving "any person" the ability to enjoin the United States for a "violation" of the Act—in effect allowing anyone to sue to enforce the public's "nonconcrete interest in the proper administration of the laws." 504 U.S. at 516–17. In contrast, plaintiffs in federal privacy cases seek to enforce the obligations owed to them by entities that misuse their personal data. These plaintiffs have a sufficiently "personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination." *Massachusetts v. EPA*, 549 U.S. 497, 517 (2007).

III. In Privacy Cases, Plaintiffs Have Standing When a Company Misuses Their Personal Information in Violation of Federal Law

This Court has long held that "Congress may enact statutes creating legal rights, the invasion of which creates standing." *Warth v. Seldin*, 422 U.S. 490, 514 (1975) (citing *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973)). It follows that the injury

relevant to the standing inquiry is the statutory violation itself, not the harmful consequences that may ultimately result. In the words of Justice Scalia, legal injury is "by definition no more than the violation of a legal right; and legal rights can be created by the legislature ." Antonin Scalia, *The Doctrine of Standing As an Essential Element of the Separation of Powers*, 17 Suffolk U. L. Rev. 881, 885 (1983) (emphasis added). This Court has recognized the distinction between injury-in-fact and resulting harm, holding that that plaintiffs suffering an injury-in-fact need not wait until the harmful consequences of that injury have materialized before enforcing their rights.[19] It is only logical that injury-in-fact be distinct from resulting harm. Requiring a plaintiff to produce a detailed audit of his damages merely to pass through the courthouse door would overturn the notice-pleading model of the civil justice system.

This rule is not only consistent with this Court's well-established precedent on Article III standing, it is simple and easy to administer. In contrast, petitioner Spokeo would have the Court allow the firm to willfully violate obligations to the plaintiff—established by Congress—and be immune from suit unless the plaintiff could also prove consequential harm. This would impose a special heightened pleading standard for privacy cases, which is precisely what Congress sought to avoid when it enacted the FCRA and other federal privacy laws. To rule in the petitioner's favor in this case

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[19] *See Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982).

would be directly contrary to the will of Congress and to this Court's precedent.

The petitioner's proposed rule would not only effect a dramatic narrowing of the FCRA, it would undermine the ability of individuals to prevent the misuse of many types of sensitive personal information. For example:

- The Cable Communications Policy Act limits the ability of cable providers to disclose subscriber information. 47 U.S.C. § 551(a) (2012).
- The Driver's Privacy Protection Act punishes the unauthorized acquisition, disclosure, or use of information from motor vehicle records. 18 U.S.C. § 2721 (2012).
- The Electronic Communications Privacy Act prohibits the interception, disclosure, or use of wire, oral, and electronic communications. 18 U.S.C. § 2520(a)-(c) (2012).
- The Fair Debt Collection Practices Act prohibits debt collectors from contacting a consumer at work if the collector knows or has reason to know that the consumer's employer prohibits such contact. 15 U.S.C. § 1692c (2012).
- The Fair and Accurate Credit Transactions Act regulates the disclose of consumer credit reports and requires parties to properly dispose of consumer information. 15 U.S.C. §§ 1681b, 1681w(a) (2012).
- The Right to Financial Privacy Act generally prohibits government authorities

from accessing individuals' bank records without notice and an opportunity to object. 12 U.S.C. § 3402 (2012).

- The Telephone Consumer Protection Act prohibits unsolicited robo-calls and faxes. 47 U.S.C. § 227(b) (2012).
- The Video Privacy Protection Act prohibits video service providers from knowingly disclosing certain consumer information. 18 U.S.C. § 2710 (2012).

Were the Court to accept Spokeo's argument that violations of privacy rights established by Congress are insufficient to establish Article III standing absent specific proof of consequential harm, the Court would severely limit the deterrent effect of federal privacy laws and contribute to the growing problem of data breach and identity theft in the United States.

CONCLUSION

For the foregoing reasons, *amici* respectfully ask this Court to affirm the decision of the Ninth Circuit below.

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SPOKEO, INC.,

Petitioner,

v.

THOMAS ROBINS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF FOR EXPERIAN INFORMATION SOLUTIONS, INC., AS *AMICUS CURIAE* SUPPORTING PETITIONER

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TABLE OF CONTENTS

Page

INTEREST OF AMICUS CURIAE 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 4

I. NO-HARM FCRA ACTIONS TURN THE ARTICLE III MODEL ON ITS HEAD BY PRODUCING "CASES" THAT ARE FILED PRECISELY BECAUSE OF THE ABSENCE OF INJURY, AND THAT OFTEN ARE BROUGHT ON BEHALF OF CLASS MEMBERS WHO AFFIRMATIVELY BENEFITED FROM THE ALLEGED VIOLATION 5

A. The Absence Of Any Concrete Injury Has Become A Feature Rather Than A Bug In FCRA Class Actions 5

B. The Decision Below Authorizes, And Class Action Plaintiffs Regularly File, FCRA Actions On Behalf Of Plaintiffs Who Are Uninjured By Or Affirmatively Benefit From The Alleged Violation 7

II. THE FCRA'S PRIVATE RIGHT OF ACTION REQUIRES TRADITIONAL INJURY IN FACT 15

III. EVEN IF THE FCRA IS READ AS AUTHORIZING STATUTORY DAMAGES WITHOUT INJURY, ARTICLE III PRECLUDES LAWSUITS BY PLAINTIFFS WHO HAVE SUFFERED NO INJURY IN FACT 26

CONCLUSION 33

TABLE OF AUTHORITIES

Page(s)

CASES

Allen v. Wright,
468 U.S. 737 (1984) 27

Armes v. Shanta Enter., Inc.,
No. 07C5766, 2009 WL 2020781
(N.D. Ill. July 8, 2009) 6

AT&T Mobility LLC v. Concepcion,
131 S. Ct. 1740 (2011) 14

Bateman v. Am. .Multi-Cinema, Inc.,
623 F.3d 708 (9th Cir. 2010) 13

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236 F.R.D. 387 (N.D. Ill. 2006) 7

Coopers & Lybrand v. Livesay,
437 U.S. 463 (1978) 14

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285 U.S. 22 (1932) 15

Dreher v. Experian Info. Solutions, Inc.,
No. 11-cv-624-JAG, 2014 WL 2800766
(E.D. Va. June 19, 2014) 2, 6, 9, 10

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472 U.S. 749 (1985) 29

Easterbrook v. Inter-Con Sec. Sys., Inc.,
No. 3:15-cv-00565 (S.D. Cal.) 11

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485 U.S. 568 (1988) 15

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486 U.S. 107 (1988) 19

Eli Lily & Co. v. Medtronic, Inc.,
496 U.S. 661 (1990) 20

Evans v. U-Haul Co.,
No. CV 07-2097-JFW, 2007 U.S. Dist. LEXIS 82026 (C.D. Cal. Aug. 14, 2007) 12, 13

FEC v. Akins,
524 U.S. 11 (1998) 28

Gabra v. Tyson Foods Inc.,
No. 15-cv-00232 (M.D. Tenn.) 11

Gezahegne v. Whole Foods Market Cal., Inc.,
No. 14-cv-00592 (N.D. Cal.) 11

Gollust v. Mendell,
501 U.S. 115 (1991) 25

Graham v. Michaels Stores Inc.,
No. 14-cv-07563 (D.N.J.) 11

Harris v. Experian Info. Solutions, Inc.,
No. 6:06-cv-1808-GRA
(D.S.C. June 30, 2009) 8, 9

Hathaway v. Mrs. Gooch's Natural Food Markets, Inc.,
No. 14-cv-00663 (S.D. Cal.) 11

Holloway v. Full Spectrum Lending,
No. CV 06-5975 DOC, 2007 WL 7698843 (C.D. Cal. June 26, 2007) 7

In re Chapman,
166 U.S. 661 (1897) 20

In re Farmers Ins. Co. FCRA Litig.,
No. CIV-03-158-F, 2006 WL 1042450
(W.D. Okla. Apr. 13, 2006) 7

In re Rhone-Poulenc Rorer Inc.,
51 F.3d 1293 (7th Cir. 1995) 14

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211 F.R.D. 328 (N.D. Ill. 2002), *appeal dismissed sub nom Albert v. Trans Union Corp.*, 346 F.3d 734 (7th Cir. 2003) 25

Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.,
510 U.S. 27 (1993) (per curiam) 16

Knights v. Publix Super Markets, Inc.,
No. 14-cv-00720 (M.D. Tenn.) 11

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558 U.S. 233 (2010) 19

Lewis v. Casey,
518 U.S. 343 (1996) 27

Lopez v. KB Toys Retail, Inc.,
No. CV 07-144-JFW, 2007 U.S. Dist. LEXIS 82025 (C.D. Cal. July 17, 2007) 12, 13

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992) ..... *passim*

Marbury v. Madison,
1 Cranch 137 (1803) 33

Murray v. GMAC Mortgage Corp.,
434 F.3d 948 (7th Cir. 2006) 6, 13

Nw. Austin Mun. Util. Dist. No. One v. Holder,
557 U.S. 193 (2009) 16

Ortiz v. Fibreboard Corp.,
527 U.S. 815 (1999) 26

Parker v. Time Warner Entm't Co.,
331 F.3d 13 (2d Cir. 2003) 14, 15

Peikoff v. Paramount Pictures Corp.,
No. 15-cv-00068 (N.D. Cal.) 11

Penn. R.R. Co. v. Int'l Coal Mining Co.,
230 U.S. 184 (1913) 18

Pollard v. Lyon,
91 U.S. 225 (1875) 29

Ragland v. Guardsmark, LLC,
No. 14-cv-00693 (S.D. Cal.) 11

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521 U.S. 811 (1997) 28

Ramirez v. Trans Union, LLC,
301 F.R.D. 408 (N.D. Cal. 2014) 6

Safeco Ins. Co. of Am. v. Burr,
551 U.S. 47 (2007) 13, 19

Shady Grove Orthopedics Assocs., P.A. v. Allstate Ins. Co.,
559 U.S. 393 (2010) 14

Steel Co. v. Citizens for a Better Env't,
523 U.S. 83 (1998) 3, 28, 30

Stillmock v. Weis Markets, Inc.,
385 F. App'x 267 (4th Cir. 2010) 18

Summerfield v. Equifax Info. Servs. LLC,
264 F.R.D. 133 (D.N.J. 2009) 6

Summers v. Earth Island Inst.,
555 U.S. 47 (2007) 27

Trans Union LLC v. Fed. Trade Comm'n,
536 U.S. 915 (2002) 5

United States v. Am. Trucking Ass'ns, Inc.,
310 U.S. 534 (1940) 19

Valley Forge Christian Coll v. Americans United for Separation of Church & State,
454 U.S. 464 (1982) 28, 30, 31

Vt. Agency of Natural Res. v. United States ex rel. Stevens,
529 U.S. 765 (2000) 30, 31

Wallace v. ConAgra Foods, Inc.,
747 F.d 1025 (8th Cir. 2014) 26

Warth v. Seldin,
422 U.S. 490 (1975) 27

White v. Experian Info. Solutions, Inc.,
No. 05-cv-1070-DOC-MLG
(C.D. Cal. Jan. 26, 2009) 9

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No. CIV.A. 99-3804, 2002 WL
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(5th Cir. 2003) 7

Zadvydas v. Davis,
533 U.S. 678 (2001) 15

STATUTES

15 U.S.C. § 1681 16

15 U.S.C. § 1681b 10, 11, 17

15 U.S.C. § 1681c 17

15 U.S.C. § 1681d 17

15 U.S.C. § 1681e 8

15 U.S.C. § 1681g 17
15 U.S.C. § 1681k 17
15 U.S.C. § 1681*l* 17
15 U.S.C. § 1681m 17
15 U.S.C. § 1681n ..... *passim*
15 U.S.C. § 1681s 24

OTHER AUTHORITIES

115 Cong. Rec. 2411 (1969) 21, 22, 23
115 Cong. Rec. 2676 (1969) 17, 21
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3 Restatement (Second) of Torts § 620 cmt. b 29

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S. Rep. No. 91-517 (1969) 16, 21

S. Rep. No. 104-185 (1995) 23

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Syndicated Office Sys., LLC, d/b/a Ctr. Fin. Control, No. 2015-CFPB-0012, at 8-14 (C.F.P.B. June 18, 2015) http://files.consumerfinance.gov/f/201520_cfpb_order-syndicated.pdf..... 24

INTEREST OF *AMICUS CURIAE* [1]

Experian Information Solutions, Inc. (Experian) is a nationwide consumer reporting agency subject to regulation under the Fair Credit Reporting Act (FCRA). The Ninth Circuit held below that plaintiffs claiming an FCRA violation "with respect to" them, 15 U.S.C. § 1681n, automatically satisfy the injury-in-fact requirement of Article III without any need to show that the alleged violation caused them any harm.

Consumer reporting agencies like Experian serve, essentially, as warehouses of consumer credit information. Experian maintains credit files on more than 200 million consumers, and, each day, answers 2 million credit inquiries and processes up to 50 million updates to its credit information database from lenders and other data furnishers.

As a nationwide consumer reporting agency, Experian is frequently subject to class action lawsuits by plaintiffs who have experienced no actual harm but seek class-wide statutory damages for alleged technical violations of the FCRA. Plaintiffs argue the Act permits plaintiffs to sue for between $100 and $1,000 in statutory damages for any allegedly willful departure from FCRA requirements "with respect to" a consumer, without expressly requiring that the consumer be injured by the violation. Indeed, it is

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[1] All parties have consented in writing to the filing of this *amicus curiae* brief. No counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus curiae* or its counsel made a monetary contribution to the preparation or submission of this brief.

not uncommon in these cases for significant numbers of class members to have actually *benefited* from the alleged violations. Due to the large number of consumers for which Experian and other credit reporting agencies maintain information, these suits can involve millions of putative class members, and thereby threaten staggering liability.

Experian accordingly has a strong interest in the proper construction of the Act as requiring traditional injury in fact, and in the enforcement of the constitutional requirement that only plaintiffs who have suffered an injury in fact may sue.

SUMMARY OF THE ARGUMENT

The decision below and others like it have given rise to a species of litigation that thoroughly inverts the case or controversy model of Article III. The federal courts have filled with "cases" that not only involve no concrete injury, but which are filed precisely *because* there is no injury—allowing entrepreneurial lawyers to obtain certification of massive classes that would be impossible if class members had experienced real, inherently individual, injuries. As the court in one typical case recently explained (apparently without irony), there was no obstacle to class certification, because "[g]iven the nature of the violation in this case, it is unlikely that anyone suffered actual injury."[2]

Such litigation in which the absence of any injury is treated as a virtue rather than a constitutional obstacle—and the accompanying subversion of Article

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[2] *Dreher v. Experian Info. Solutions, Inc.*, No. 3:11-CV-00624-JAG, 2014 WL 2800766, at *3 (E.D. Va. June 19, 2014).

III—has proliferated in the federal courts. The FCRA has been a particular font of such no-injury lawsuits, as it is replete with technical provisions whose alleged violation can be transformed into lawsuits on behalf of thousands or millions of uninjured class members. Indeed, due to the nature of the FCRA many "fail[ures] to comply with any requirement," 15 U.S.C. § 1681n, not only do not injure, but in fact *benefit*, the applicable consumers—for example, when a practice results in errors that favor consumers, such as inaccurately reporting delinquent credit accounts as properly paid. Yet under the injury-in-law theory adopted below, such consumers have been "injured," and multi-billion-dollar lawsuits can be—and often have been—brought on their behalf.

As Petitioner's brief demonstrates, Article III requires that a plaintiff have been concretely injured *in fact*, and a mere statutory violation without more cannot suffice. But this Court need not reach this fundamental constitutional issue, because the FCRA itself can reasonably be construed as requiring a showing of injury. Indeed, Experian submits that, under ordinary principles of statutory construction, this is the *better* reading of the text and structure of the FCRA. The text of § 1681n(a)(1)(A) provides for "damages" of $100 to $1000—in marked contrast to the neighboring § 1681n(a)(1)(B), which omits the word "damages"—thereby indicating that a consumer must have been damaged in some fashion to qualify. Moreover, it is implausible that Congress intended—in the face of Article III's requirements—to authorize lawsuits by uninjured consumers, and even more implausible that it intended to authorize lawsuits by

consumers who *benefited* from an alleged violation. The far more natural reading is one that preserves the traditional requirement that a plaintiff have suffered an actual injury.

ARGUMENT

The holding below permits plaintiffs who have suffered no injury, and in many cases have affirmatively benefited from the conduct at issue, to file federal lawsuits seeking what amounts to a statutory bounty. In so holding, the Ninth Circuit ratified a mutant new species of litigation that would have been unrecognizable to the Framers of Article III—or even the enacters of the FCRA—one in which the absence of injury in fact is a class-action-generating feature rather than a constitutional bug. These cases exist precisely *because* they involve no injury, as actual injury typically entails individual damages claims that preclude class action treatment. In the absence of injury—a frequent circumstance due to the often technical requirements of the FCRA—enterprising lawyers can waive actual damages claims and proceed on behalf of often-massive classes of identically uninjured plaintiffs seeking statutory damages that can run into the billions.

The Ninth Circuit's holding that a bare statutory violation related to the plaintiff satisfies the injury-in-fact requirement of Article III is squarely contrary to this Court's cases. But the Court need not address this fundamental constitutional question, because there is no reason to believe that the FCRA, properly interpreted, creates a cause of action for consumers

who have suffered no injury, or affirmatively benefited, from a statutory violation.

I. NO-HARM FCRA ACTIONS TURN THE ARTICLE III MODEL ON ITS HEAD BY PRODUCING "CASES" THAT ARE FILED PRECISELY *BECAUSE* OF THE ABSENCE OF INJURY, AND THAT OFTEN ARE BROUGHT ON BEHALF OF CLASS MEMBERS WHO AFFIRMATIVELY BENEFITED FROM THE ALLEGED VIOLATION

A. The Absence Of Any Concrete Injury Has Become A Feature Rather Than A Bug In FCRA Class Actions.

Due to the nature of the FCRA's requirements, the statute frequently produces alleged violations that do not harm, and often even benefit, the consumers to whom they relate. At the same time, the nature of credit reporting means that many credit reporting agency practices and policies will apply to millions of consumers. In the absence of actual injuries and damages whose individualized character prevents class action treatment, these circumstances have produced the opportunity for enterprising lawyers to file suit on behalf of thousands or millions of uniformly uninjured consumers, seeking statutory damages that can run into the hundreds of billions of dollars. *See, e.g., Trans Union LLC v. Fed. Trade Comm'n*, 536 U.S. 915 (2002) (Kennedy, J., dissenting from denial of certiorari) ("Because the FCRA provides for statutory damages of between $100 and $1,000 for each willful violation, petitioner faces potential liability approaching $190 billion.").

The absence of injury is a key to class action treatment of these cases—and therefore a key to the threat of massive damages and attorney's fees that provide the incentive for filing them. As the Seventh Circuit has explained, if damages for individual injuries were at issue, "[c]ommon questions no longer would predominate, and an effort to determine a million consumers' individual losses would make the suit unmanageable." *Murray v. GMAC Mortgage Corp.*, 434 F.3d 948, 953 (7th Cir. 2006).

As a result, FCRA class action attorneys therefore regularly waive claims for actual damages, which they can do only if the injury to class members is nonexistent, or so insignificant that it may be waived without turning the named plaintiffs into inadequate class representatives. *See id.*; *Dreher v. Experian Info. Solutions, Inc.*, No. 3:11-CV-00624-JAG, 2014 WL 2800766, at *3 (E.D. Va. June 19, 2014) ("Given the nature of the violation in this case, it is unlikely that anyone suffered actual injury."); *Armes v. Shanta Enter., Inc.*, No. 07C5766, 2009 WL 2020781, at *6 (N.D. Ill. July 8, 2009) ("[T]he parties do not point to any instance where a potential class member suffered actual harm from the alleged FACTA violation," which consisted of printing too many credit card digits on receipts); *Summerfield v. Equifax Info. Servs. LLC*, 264 F.R.D. 133, 141 (D.N.J. 2009) ("[T]he likelihood of substantial actual damages is almost non-existent.").[3]

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[3] *See also, e.g., Ramirez v. Trans Union, LLC*, 301 F.R.D. 408, 419 (N.D. Cal. 2014) ("[A]s Plaintiff is seeking statutory damages and not actual damages, whether he was actually denied credit or received inferior credit terms because of Trans

B. The Decision Below Authorizes, And Class Action Plaintiffs Regularly File, FCRA Actions On Behalf Of Plaintiffs Who Are Uninjured By Or Affirmatively Benefit From The Alleged Violation.

The extent to which no-harm FCRA litigation subverts the ordinary Article III model is further highlighted by another feature of such litigation: Due to the nature of the FCRA's requirements, the litigation is often brought on behalf of class members who have benefited from the claimed violation. For example, even aside from the FCRA's many technical provisions, one of the most frequent types of lawsuits

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(continued)

Union's [conduct] is not at issue."); *Holloway v. Full Spectrum Lending*, No. CV 06-5975 DOC RNBX, 2007 WL 7698843, at *7 (C.D. Cal. June 26, 2007) (noting, in support of class certification, that "[defendant] has argued that there are no injuries"); *Cavin v. Home Loan Ctr., Inc.*, 236 F.R.D. 387, 392 (N.D. Ill. 2006) ("[T]he Cavins are seeking only statutory damages, and those class members who want to pursue actual damages can opt out of the class."); *In re Farmers Ins. Co., Inc., FCRA Litig.*, No. CIV-03-158-F, 2006 WL 1042450, at *6 (W.D. Okla. Apr. 13, 2006) (certifying class over defendants' objection "that plaintiffs have limited their requested class relief to statutory damages in order to avoid class certification hurdles inherent in seeking actual damages."); *White v. Imperial Adjustment Corp.*, No. CIV.A. 99-3804, 2002 WL 1809084, at *13 (E.D. La. Aug. 6, 2002) ("The fact that plaintiff seeks statutory and punitive damages, as opposed to actual damages, does not in this Court's opinion create conflict, rendering White an inadequate representative of the class. Indeed, not unlike the majority of the cases, actual damages are difficult if not impossible to demonstrate."), *aff'd in relevant part*, 75 F. App'x 972 (5th Cir. 2003).

filed under the FCRA alleges inaccuracy in consumer credit reports, under the FCRA provision requiring "reasonable procedures to assure maximum possible accuracy of the information" in each report. 15 U.S.C. § 1681e(b). A credit report inaccuracy can favor a consumer as easily as it can disfavor her—as when unreasonable procedures result in a credit reporting agency inaccurately reporting a delinquent account as timely paid. Yet under the holding below, even beneficiaries of such violations are deemed to have suffered an Article III injury—as a violation of FCRA requirements "with respect to" them, even to their benefit, is automatically deemed an injury—and are entitled to seek statutory damages.

Such cases, moreover, are far from theoretical. For example, in *Harris v. Experian Information Solutions, Inc.*, No. 6:06-cv-1808-GRA (D.S.C. June 30, 2009), the plaintiff class claimed that Experian and other credit reporting agencies violated § 1681e(b)'s "reasonable procedures" requirement by failing to report consumers' credit limits for their Capital One credit cards (information that Capital One refused to provide to credit reporting agencies). The omission of credit-limit information had no consistent effect on consumers: It decreased the credit scores of only certain consumers, *increased* the scores of many others, and had no effect on still others. *Harris*, No. 6:06-cv-1808-GRA, slip op. at 5. Although the named plaintiff was one of those who had actually benefited from the alleged violation, he sought to represent a class of over four million consumers—including the many consumers whose credit scores were increased by the alleged inaccuracy—which, at $100 to $1,000 per violation, sought aggregate statutory damages

between $400 million and $4 billion. The district court certified a class that included the consumers who benefited from the alleged violation—and therefore plainly had not been harmed or injured (in any ordinary sense of those words) by the alleged violation. *Id.* at 2-5. All of these consumers would have Article III standing under the decision below, because the Ninth Circuit held that the mere existence of a statutory violation qualifies as "injury" for purposes of Article III.

Likewise, in *White v. Experian Information Solutions, Inc.*, No. 05-cv-1070-DOC-MLG (C.D. Cal. Jan. 26, 2009), the plaintiff claimed that Experian and two other nationwide consumer reporting agencies, Trans Union and Equifax, violated the FCRA by not reporting that certain debts had been discharged in bankruptcy. The claimed error, however, had no impact on many debtors and actually *improved* the credit scores of many others. *White*, No. 05-cv-1070-DOC-MLG, slip op. at 9. Nevertheless, the plaintiffs sought between hundreds of millions and billions of dollars in statutory damages on behalf of a class of nearly eight million consumers. The district court deferred a final ruling on the class's viability, but noted the "serious constitutional issues" implicated by the class's Article III standing. *Id.* at 11.

In addition to these examples of suits on behalf of consumers who benefited from the alleged violations, there are many others in which it is clear that the violation had no effect at all. The plaintiff in *Dreher v. Experian Information Solutions, Inc.*, No. 11-cv-624-JAG (E.D. Va.), alleges that Experian inaccurately reported the *name* of his creditor, by

listing his Advanta credit card debt under the familiar Advanta Bank name instead of under the unfamiliar name of CardWorks, a processor assigned to handle the accounts after Advanta Bank was placed in receivership. Experian reported the debts under the only name that would be recognizable to consumers holding Advanta credit cards, thus at least arguably benefiting consumers. Yet, the *Dreher* plaintiff seeks statutory damages on behalf of nearly 70,000 consumers affected by the same issue who at worst were unharmed, and arguably were benefited by the technical inaccuracy. While the district court found Article III standing by relying on the Ninth Circuit's decision below in the instant case, *see Dreher v. Experian Info. Solutions, Inc.*, No. 3:11-CV-624, 2014 WL 6834867, at *3-4 (E.D. Va. Dec. 3, 2014), it has since lamented that the *Dreher* class action does not "have a lot of social value," as Experian's actions did not cause "injury." *See* Tr. of Oral Arg. at 8:14-16, 10:10-14, *Dreher v. Experian Info. Solutions, Inc.*, No. 3:11-CV-624 (E.D. Va. Apr. 13, 2015), Dkt. No. 326.

Another theory of no-harm liability seen regularly under the FCRA relies on 15 U.S.C. § 1681b(b)(2), which requires a party requesting a consumer's credit report "for employment purposes" to have (1) told the consumer about the request "in a document that consists solely of the disclosure," and (2) obtained the consumer's consent. *Id.* § 1681b(b)(2)(A)(i)-(ii). At least three class actions have been filed in 2015 and five in 2014 seeking only statutory damages for an

alleged violation of this provision.[4] Each suit's only purported basis for liability is the defendant's failure to provide a *stand-alone* disclosure. *See id.* § 1681b(b)(2)(A)(i) (requiring "a document that consists *solely* of the disclosure" (emphasis added)). These plaintiffs do not claim to have been unaware of the disclosure, to have not consented to the request, or to have otherwise been harmed in any identifiable way. Nonetheless, they seek $100 to $1,000 per disclosure on behalf of sizable putative classes.

Indeed, this very case is a good example. Respondent alleges that Petitioner violated the FCRA by inaccurately reporting a variety of seemingly positive facts about him: that he "has a graduate degree, that his economic health is 'Very Strong,' and that his wealth level [is in] the 'Top 10%.'" First Am. Compl. ¶ 32. Respondent further alleges that his consumer report wrongly reports "that he was employed in a professional or technical field," even though he in fact "is currently out of work and seeking employment." *Id.* ¶¶ 31, 34. Despite the fact that Respondent likely benefits from these inaccuracies—in the (vanishingly unlikely) event a potential employer or creditor is basing decisions on the Spokeo website, these errors would presumably

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[4] *See Easterbrook v. Inter-Con Sec. Sys., Inc.* (S.D. Cal. No. 3:15-cv-00565); *Gabra v. Tyson Foods Inc.* (M.D. Tenn. No. 15-cv-00232); *Peikoff v. Paramount Pictures Corp.* (N.D. Cal. No. 15-cv-00068); *Graham v. Michaels Stores Inc.* (D.N.J. No. 14-cv-07563); *Knights v. Publix Super Markets, Inc.* (M.D. Tenn. No. 14-cv-00720); *Gezahegne v. Whole Foods Market Cal., Inc.* (N.D. Cal. No. 14-cv-00592); *Hathaway v. Mrs. Gooch's Natural Food Markets, Inc.* (S.D. Cal. No. 14-cv-00663); *Ragland v. Guardsmark, LLC* (S.D. Cal. No. 14-cv-00693).

improve Respondent's standing—he seeks to represent a class of "millions of individuals," which, at $100 to $1,000 per violation, seeks aggregate statutory damages exceeding $1 billion. *Id.* ¶ 39, p. 16.

Nor are such no-harm statutory damages suits limited to credit reporting. Numerous lawsuits were filed in the wake of the 2003 Fair and Accurate Credit Transactions Act (FACTA), which among other things required retailers to redact the expiration date and all but the last five digits of a credit card number on all electronically printed receipts. In many of these putative class actions—brought under the FCRA statutory damages provision at issue in this case, 15 U.S.C. § 1681n—the plaintiffs claimed no actual injury from the failure to redact, but nevertheless sought hundreds of millions or even billions of dollars in statutory damages.

In *Lopez v. KB Toys Retail, Inc.*, No. CV 07-144-JFW (CWx), 2007 U.S. Dist. LEXIS 82025, at *14-15 (C.D. Cal. July 17, 2007), for example, the plaintiff sought statutory damages between $290 million and $2.9 billion, even though, as the court noted, the putative class members could not have been harmed by the inclusion of their credit card numbers' first four (not last five) digits, which merely identify the issuing bank. And in *Evans v. U-Haul Co.*, No. CV 07-2097-JFW, 2007 U.S. Dist. LEXIS 82026, at *14-17 (C.D. Cal. Aug. 14, 2007), the plaintiff sought between $115 million and $1.5 billion in statutory damages for the defendant's inclusion of expiration

dates on receipts, despite admitting that she suffered no harm from the practice.[5] *See generally* Sheila B. Scheuerman, *Due Process Forgotten: The Problem of Statutory Damages and Class Actions*, 74 Mo. L. Rev. 103, 104-06, 111-14, 134-35 (2009).

No-injury actions of this type, which essentially co-opt the federal courts to enforce abstract statutory violations, are more than just a nuisance. They threaten staggering liability in the absence of any actual harm suffered by an individual consumer. As noted, the named plaintiffs will frequently waive any claims for actual damages in an effort to obtain certification of massive classes on their statutory damages claims. *See, e.g., Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 54 (2007) (claiming no actual harm); *Murray*, 434 F.3d at 952-53.

Such windfall damages can cripple or destroy businesses. The FCRA's statutory damages of $100 to $1,000 per violation can quickly add up to crushing liability for credit reporting agencies like Experian, which maintain files on millions, if not hundreds of millions, of consumers, and face suits over procedures that apply to large numbers of those consumers. *See, e.g.*, Scheuerman, *supra*, at 104.

Faced with potential liability in the hundreds of millions or billions of dollars—liability that would

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[5] Although the district court in both *Lopez* and *Evans* denied class certification in part because the staggering amount of statutory damages sought was wholly out of proportion to the harm alleged (*i.e.*, none), the Ninth Circuit subsequently rejected such disproportionality as a basis for denying class certification. *See Bateman v. Am. Multi-Cinema, Inc.*, 623 F.3d 708, 721 (9th Cir. 2010).

sink even large companies—defendants are put under tremendous pressure to settle, even when the class's claims are questionable and the defendants have meritorious defenses. This Court has often noted "the risk of 'in terrorem' settlements that class actions entail." *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752 (2011) ("Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims."); *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978) ("Certification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense."); *see also In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) (Posner, J.) (noting "intense pressure to settle"); Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (1973) (calling settlements induced by small probabilities of immense judgments in class actions "blackmail settlements").

The risk of defendants being forced into unfair settlements is exacerbated in statutory damages class actions. As Justice Ginsburg recently explained: "When representative plaintiffs seek statutory damages, pressure to settle may be heightened because a class action poses the risk of massive liability unmoored to actual injury." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 445 n.3 (2010) (Ginsburg, J., dissenting); *see also Parker v. Time Warner Entm't Co.*, 331 F.3d 13, 22 (2d Cir. 2003) (aggregated statutory damages claims can produce "an *in terrorem* effect on defendants,

which may induce unfair settlements"); *id.* at 29 (Newman, J. concurring) (same).

The Ninth Circuit's decision below, and other decisions like it, encourages the filing of numerous no-injury class actions that threaten liability of staggering proportions decoupled from any actual harm, even where—as here—the consumer may have benefited from the alleged statutory violation.

II. THE FCRA'S PRIVATE RIGHT OF ACTION REQUIRES TRADITIONAL INJURY IN FACT

The Court need not reach the fundamental Article III questions presented in this case, because the FCRA itself, properly interpreted, requires plaintiffs to show they have suffered an actual injury in fact. And the grave constitutional problems raised by reading the FCRA to allow for no-injury suits in any event require that, if fairly possible—which it plainly is—the Court should construe the FCRA to require traditional injury in fact.

"'It is a cardinal principle' of statutory interpretation that when an Act of Congress raises 'a serious doubt' as to its constitutionality, 'th[e] Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.'" *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001) (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)). The constitutionally unproblematic construction must be adopted "unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). Due to the vital importance of avoiding

the unnecessary adjudication of difficult and far-reaching constitutional issues, this Court has decided cases "on nonconstitutional grounds even though the petition for certiorari presented only a constitutional question"—and should do so again here. *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 33 (1993) (per curiam); *accord Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 205 (2009) ("[N]ormally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case" (quotation marks omitted)). Here, the better reading of the FCRA in any event is one that requires traditional, real world injury in fact.

A. There is every indication that the FCRA's private right of action requires actual, real-world injury in fact. In enacting the FCRA, Congress was solely concerned with remedying and preventing *harm* to consumers, principally from the disclosure of adverse information in their credit reports. "The purpose of the [FCRA] is to prevent consumers from being unjustly *damaged* because of inaccurate or arbitrary information in a credit report." S. Rep. No. 91-517, at 1 (1969) (emphasis added); *accord* 15 U.S.C. § 1681 ("An elaborate mechanism has been developed for investigating and evaluating the credit worthiness, credit standing, credit capacity, character, and general reputation of consumers."). [6] "Th[e]

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[6] *See also* Virginia G. Maurer, *Common Law Defamation and the Fair Credit Reporting Act*, 72 Geo. L.J. 95, 97 (1983) (FCRA was prompted by growing recognition in 1960s and 70s that "a higher rate of information transfer increases the opportunity for *injury* to the individuals about whom unfavorable information is reported.") (emphasis added).

legislation [was] not intended to place undue burdens on legitimate credit bureaus" but instead sought to address the "far too many cases where *adverse* credit reports cause irreparable *harm* to the individual." 115 Cong. Rec. 2676 (1969) (statement of Sen. Williams, co-sponsor of S. 823) (emphases added).

The FCRA's singular focus on preventing injury is evident throughout the statutory scheme. The Act imposes requirements governing actions to be taken by employers "before taking any *adverse* action based" on a credit report, 15 U.S.C. § 1681b(b)(3)(A) (emphasis added); reporting stale "*adverse* item[s] of information" predating the credit report by more than seven years, *id.* § 1681c(a)(5) (emphasis added); confirmation of certain "information that is *adverse* to the interest of the consumer," *id.* § 1681d(d)(4) (emphasis added); disclosure of the "the key factors that *adversely* affected the credit score of the consumer," *id.* § 1681g(f)(1)(C) (emphasis added); dissemination of "public record information which is likely to have an *adverse effect* on a consumer's ability to obtain employment," *id.* § 1681k(a)(2) (emphasis added); re-verification of "*adverse* information" in an investigative consumer report, *id.* § 1681*l* (emphasis added); and the "[d]uties of users taking *adverse* actions on basis of information contained in consumer reports," *id.* § 1681m(a) (emphasis added). These numerous references to harmful information and harmful actions show that Congress sought to prevent harm to consumers, not authorize uninjured consumers to seek a windfall.

B. In keeping with the statute's purpose, the plain language of the FCRA's private right of action for damages shows that it is only available to individuals

who have suffered injury. When a credit reporting agency "willfully fails to comply with any requirement imposed under [the FCRA] with respect to any consumer," the statute provides a private cause of action to sue for "an amount equal to the sum of any actual *damages* sustained by the consumer as a result of the failure or *damages* of not less than $100 and not more than $1,000." 15 U.S.C. § 1681n(a)(1)(A) (emphases added). By using the undefined term "damages"—which in ordinary legal parlance means "[m]oney claimed by, or ordered to be paid to, a person as compensation for *loss* or *injury*," BLACK'S LAW DICTIONARY 416 (8th ed. 2005) (emphasis added)—the statute limits recovery to consumers who have suffered at least some minimal "loss or injury." *See also Penn. R.R. Co. v. Int'l Coal Mining Co.*, 230 U.S. 184, 204 (1913) ("The statute gives a right of action for *damages* to the *injured* party, and by the use of these legal terms clearly indicated that the damages recoverable were those known to the law and intended as compensation for the injury sustained."). The FCRA's statutory-damages provision simply allows the consumer to elect the *measure* of "damages" he or she will recover—*either* "any actual damages" *or* "damages of not less than $100 and not more than $1,000."[7]

The contrasting language in the remainder of section 1681n demonstrates further Congress's intent

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[7] *See Stillmock v. Weis Markets, Inc.*, 385 F. App'x 267, 277 (4th Cir. 2010) (Wilkinson, J., concurring) ("The fact that statutory damages are available in lieu of actual damages suggests that they too serve to compensate individual consumers for their injuries.").

to provide for statutory damages as an alternative measure of actual damages. The very next paragraph in section 1681n, governing damages for obtaining credit reports under false pretenses, provides for "actual damages or $1,000." 15 U.S.C. § 1681n(a)(1)(B). By providing for $1,000 without classifying that award as a species of "damages," Congress evinced an intent to presume injury from the privacy invasion—in sharp contrast to the provision at issue here, which requires "damages." *Compare* 15 U.S.C. § 1681n(a)(1)(A) *with id.* § 1681n(a)(1)(B). Congress is "presumed" to act "intentionally" in such "disparate inclusion or exclusion," *Kucana v. Holder*, 558 U.S. 233, 249 (2010) (internal quotation marks and alteration omitted), and any other reading would render the term "damages" superfluous, contrary to well-settled principles of statutory interpretation. *See, e.g.*, *Safeco*, 551 U.S. at 60 (courts should "[g]ive effect, if possible, to every clause and word of a statute.") (brackets and internal quotation marks omitted).

C. Reading the FCRA's private right of action provision as allowing for no-injury suits would untenably impute an irrational intent to Congress. Courts should avoid construing statutes to produce "absurd or futile results plainly at variance with the policy of the legislation as a whole." *EEOC v. Commercial Office Prods. Co.*, 486 U.S. 107, 120 (1988) (quoting *United States v. Am. Trucking Ass'ns., Inc.*, 310 U.S. 534, 543 (1940)) (internal quotation marks omitted). Moreover, even where an interpretation is not entirely absurd, in choosing between two permissible interpretations of statutory text, this Court disfavors interpretations that

Congress cannot plausibly have intended. *See, e.g.*, *Eli Lilly & Co. v. Medtronic, Inc.*, 496 U.S. 661, 672-3, (1990) (Court will not ascribe "implausible" intention to Congress absent "strong evidence" of such intention).

Here, interpreting the FCRA to permit statutory damages suits without any showing of injury not only requires assuming that Congress intentionally departed from the longstanding tradition under which injury in fact is necessary; it requires the wholly implausible assumption that Congress intended to authorize statutory damages for consumers who *benefited* from the alleged violation. Consumers with false *positive* information in their credit reports already receive an unwarranted benefit in the form of an increased likelihood of unjustified extensions of credit and the like. *See generally* Roger D. Blair & Virginia Maurer, *Statute Law and Common Law: The Fair Credit Reporting Act*, 49 Mo. L. Rev. 289, 294 (1984). It would be not merely implausible but absurd to suggest that Congress meant to bestow on those consumers a second unjustified windfall in the form of statutory damages.

Moreover, the specter of statutory-damage class actions in such cases presents a serious threat of staggering liability that would cripple or destroy even large companies, and creates a strong risk that defendants would be forced into unfair settlements. Nothing in the statute's text or in the legislative history indicates that Congress intended such "unjust [and] absurd" results. *In re Chapman*, 166 U.S. 661, 667 (1897).

D. The FCRA's legislative history unequivocally shows that Congress sought to prevent harm to consumers, not authorize suits based on harmless or beneficial conduct. *See generally* Scheuerman, *supra*, at 138 ("Congress was particularly concerned with the harm erroneous information in a credit report caused consumers ") (discussing FCRA's legislative history). The Senate Report explicitly states that "[t]he purpose of the [FCRA] is to prevent consumers from being unjustly *damaged* because of inaccurate or arbitrary information in a credit report." S. Rep. No. 91-517 at 1 (emphasis added). Inaccurate information was a "serious problem" not for its own sake, but because of its impact on "citizens whose reputations [were] unjustly maligned." 115 Cong. Rec. 2411 (1969) (statement of Sen. Proxmire, co-sponsor of S. 823). Indeed, the Act was premised on the understanding that while "[i]t would be unrealistic to expect credit reporting agencies to be absolutely accurate on every single case[,] consumers affected by an *adverse* rating do have a right to present their side of the story and to have inaccurate information expunged from their file." *Id.* at 2412 (statement of Sen. Proxmire, co-sponsor of S. 823) (emphasis added).[8] The Act was "not intended to place undue burdens on legitimate credit bureaus," but "only" to "insure fair and equitable credit reporting." 115 Cong. Rec. 2676 (1969) (statement of

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[8] *See also* 115 Cong. Rec. 2411 (1969) (statement of Sen. Proxmire, co-sponsor of S. 823) ("Given the inherent difficulties involved in collecting, storing, and distributing information, it is unrealistic to expect 100 percent accuracy. Errors can crop up in a variety of ways.").

Sen. Williams, co-sponsor of S. 823). "Entitled the 'Fair Credit Reporting Act,' the bill could just as well be called the 'Good Name Protection Act.'" 116 Cong. Rec. 6200 (1970) (statement of Rep. Sullivan).[9]

In keeping with the unitary focus on consumer harm, Congress devoted a full day of hearings to the testimony of "individual citizens adversely affected by credit reporting agencies." Fair Credit Reporting Act: Hearings on S. 823 Before the Subcomm. on Fin. Instit. of the Senate Comm. on Banking and Currency, 91st Cong., 3 (1969). To justify the need for congressional action, the Bill's sponsor emphasized individual stories of credit reports containing false and injurious information causing real world harm. 115 Cong. Rec. 2411-12 (1969) (statement of Sen. Proxmire) (describing a New York assemblyman with a "falsely blemished record," a Maine housewife who "lost virtually all her credit," a Pennsylvania woman who "was turned down for major medical coverage by an insurance company" due to false adverse information in a credit

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[9] The FCRA's legislative history is replete with references to preventing and correcting harm to consumers. *See also, e.g.*, 115 Cong. Rec. 33,408 (1969) (statement of Sen. Proxmire) (FCRA allowed the "consumer access to his credit file so that he is not *unjustly damaged* by an erroneous credit report." (emphasis added); 115 Cong. Rec. 33,412 (1969) (statement of Sen. Williams) (the "[FCRA] will prevent consumers from being *unjustly damaged* by inaccurate credit reports.") (emphasis added); 116 Cong. Rec. 36,574 (1970) (statement of Rep. Wylie) ("[M]istakes do occasionally occur in various types of credit reports, which mistakes are *harmful* to consumers in their efforts to obtain credit, insurance or employment.") (emphasis added).

report, and a California man who has "never been able to obtain any credit" due to false adverse information in his credit report, *inter alios*).

For 26 years—from the enactment of the FCRA in 1970 to the 1996 amendments—the Act's private right of action required all plaintiffs to show actual damages. *See generally* Scheuerman, *supra*, at 138-39. There is no indication that Congress sought to completely upend 26 years of practice by authorizing no-injury suits when, in 1996, it added statutory damages as an alternative measure of damages.[10] Rather, while the availability of statutory damages now allows plaintiffs to recover without proof of the *amount* of damages, it does not eliminate the baseline requirement of proving at least some minimal harm or injury caused by the alleged violation.

E. Construing the FCRA to require traditional injury in fact does not pose any enforcement problems because the Act provides that administrative agencies—principally the Federal Trade Commission ("FTC") and the Consumer Financial Protection Bureau ("CFPB")—as well as state attorneys general will enforce the Act's terms even when private actions are unavailable. *See* 15

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[10] There is no meaningful legislative history as regards the addition of the statutory damages provision in 1996. *See* Scheuerman, *supra*, at 141 n.302 ("Apart from one paragraph by Consumers Union praising the statutory damages provision, it is not mentioned in any of the legislative history."). If anything, the Senate Report's "concern with 'consumers who have been wronged[]' suggest[s]" that Congress meant to extend statutory damages only to "injured consumers." *Id.* at 141-42 (quoting S. Rep. No. 104-185, at 49 (1995)).

U.S.C. § 1681s(a)-(c) (providing for enforcement of the FCRA by the FTC, the CFPB, and state attorneys general). For example, the CFPB accepts complaints from consumers regarding inaccuracies on their credit reports and forwards them to credit reporting agencies, working to get a response. *See Submit a Complaint*, Consumer Financial Protection Bureau http://www.consumerfinance.gov/complaint/ (last visited June 30, 2015). Since 2011, the CFPB has fielded over 43,000 complaints about inaccuracies on credit reports. *See Beta Consumer Complaints Visualization*, Consumer Financial Protection Bureau, https://data.consumerfinance.gov/view/wkue-ycpk (last visited June 30, 2015).

Both the CFPB and the FTC actively enforce the FCRA. For example, when a furnisher of information allegedly did not respond to numerous consumer disputes within the 30-day time limit established by the FCRA, the CFPB obtained a consent order requiring changes in the furnisher's business practices and payment of an over $5 million civil penalty. *See Syndicated Office Sys., LLC, d/b/a Ctr. Fin. Control*, No. 2015-CFPB-0012, at 8-14 (C.F.P.B. June 18, 2015) (consent order), http://files.consumerfinance.gov/f/201506_cfpb_order-syndicated.pdf. When a credit reporting agency allegedly refused to investigate disputes and promptly correct errors in credit reports, the FTC brought an action in federal district court which led to a $3.5 million settlement and an agreement from the defendant to alter its business practices. *See* Press Release, Fed. Trade Comm'n, TeleCheck to Pay $3.5 Million for Fair Credit Reporting Act Violations (Jan. 16, 2014), https://www.ftc.gov/news-

events/press-releases/2014/01/telecheck-pay-35-million-fair-credit-reporting-act-violations.

The FCRA's delegation of enforcement authority to executive agencies, who are accountable to the public and whose prosecutorial discretion is cabined by legal and political checks, vindicates the public's interest in ensuring that the law is obeyed—without the need to authorize bounties for harmless and technical violations of the FCRA or to transgress Article III. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 576-77 (1992); *see also In re Trans Union Corp. Privacy Litig.*, 211 F.R.D. 328, 351 (N.D. Ill. 2002) ("[A]ny 'uninformed victims' who have suffered no actual economic damage, have been and continue to be protected by the FTC's enforcement of the [FCRA] and regulations."), *appeal dismissed sub nom. Albert v. Trans Union Corp.*, 346 F.3d 734 (7th Cir. 2003). Unlike entrepreneurial class action lawyers, who will generally prefer no-injury class actions due to the uniformity of the no-injury class and the ease of gaining class certification, the executive agencies can be expected to pursue the most serious, harmful, and widespread violations of the FCRA and thereby protect consumers from the real-world harm that the FCRA seeks to prevent.

F. The serious constitutional problems posed by a contrary interpretation of the FCRA command interpreting the Act's private right of action to require plaintiffs to show traditional injury in fact. When confronted with such constitutional concerns, this Court has construed private rights of action in federal statutes to extend only as far as Article III permits. *See, e.g.*, *Gollust v. Mendell*, 501 U.S. 115, 122-23, 125-26 (1991) (construing Securities

Exchange Act of 1934 to require plaintiffs to "maintain some continuing financial stake in the litigation" in order to "avoid the serious constitutional question that would arise" from a contrary construction, despite lack of explicit "textual restrictions" on private right of action); *see also Wallace v. ConAgra Foods, Inc.*, 747 F.3d 1025, 1032 (8th Cir. 2014) ("Rather than confronting the difficult constitutional question whether Congress can drill through this hard floor of injury *in fact* by creating an injury *in law* we follow the traditional rule and 'independently inquire whether there is another interpretation, not raising serious constitutional concerns, that may fairly be ascribed to the statute.") (internal quotations and citations omitted). The serious constitutional problems raised by reading the FCRA to allow for no-injury suits, discussed below, compel construing the FCRA to require injury in fact here.[11]

III. EVEN IF THE FCRA IS READ AS AUTHORIZING STATUTORY DAMAGES WITHOUT INJURY, ARTICLE III PRECLUDES LAWSUITS BY PLAINTIFFS WHO HAVE SUFFERED NO INJURY IN FACT

Plaintiffs bringing no-injury suits under the FCRA (and other statutes providing for statutory damages)

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[11] Because the proper construction of the FCRA is "logically antecedent' to Article III concerns"—since those concerns arise only if the FCRA is interpreted to allow for no-injury suits—the Court may construe the Act so as to avoid the constitutional question. *See Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 831 (1999).

lack Article III standing, which does not extend to private attorneys general seeking bounties for harmless and technical legal violations. By prohibiting private attorney general enforcement schemes, Article III furthers separation-of-powers values by ensuring that enforcement of the law is undertaken by the democratically accountable Executive.

A. "[T]he requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute." *Summers v. Earth Island Inst.*, 555 U.S. 488, 497 (2009). This essential element of Article III's case-or-controversy "'is founded in concern about the proper—and properly limited—role of the courts in a democratic society.'" *Id.* at 492-93 (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975)). That role is limited to vindicating the rights of individuals and "redress[ing] or prevent[ing] actual or imminently threatened injury to persons caused by private or official violation of law." *Id.* at 492; *see also Lewis v. Casey*, 518 U.S. 343, 353 n.3 (1996). Vindicating the broader public interest in seeing that the laws are obeyed is the province of the political branches. *Lujan*, 504 U.S. at 576-77.

As this Court has repeatedly explained, the "actual injury" component of Article III's case or controversy requirement is necessary to maintain the separation of powers. *Lewis*, 518 U.S. at 353 n.3; *Lujan*, 504 U.S. at 559-60, 576-77. "[F]ederal courts may exercise power only in the last resort, and as a necessity, and only when adjudication is consistent with a system of separated powers and the dispute is one traditionally thought to be capable of resolution through the judicial process." *Allen v. Wright*, 468 U.S. 737, 752

(1984) (citations omitted). "We accept the judiciary's displacement of the democratically elected branches when necessary to decide an actual case," but in the absence of the need to remedy an individual's injury, the courts may not reach out to address alleged violations of the law. John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 Duke L.J. 1219, 1230 (1993).

In keeping with these principles, a mere violation of a statute with respect to a particular individual—absent some actual adverse affect on that individual—is not an "injury" sufficient to confer Article III standing. A plaintiff's interest in such a case is no different from the general public interest "in seeing that the law is obeyed," which this Court has repeatedly held is insufficient for a private litigant to invoke the judicial power. *E.g.*, *FEC v. Akins*, 524 U.S. 11, 24 (1998); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107 (1998); *Valley Forge Christian Coll. v. Americans United for Separation of Church & State*, 454 U.S. 464, 485 (1982). Thus, while Congress can allow a private party to invoke the judicial power based on a "concrete, *de facto* injur[y]," *Lujan*, 504 U.S. at 578, "[i]t is settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing." *Raines v. Byrd*, 521 U.S. 811, 820 n.3 (1997).

Attempting to avoid these principles, the Solicitor General incorrectly argued in opposing certiorari in this case that the common law allowed for no-injury defamation suits based merely on false but harmless statements. But while plaintiffs could recover presumed or nominal damages for certain categories

of statements—libel and slander per se—without proof of pecuniary loss, the law allowed this only because those statements were *inherently injurious*. *See, e.g.*, *Pollard v. Lyon*, 91 U.S. 225, 227 (1875) ("Certain words, [*i.e.*, those slanderous per se,] all admit, are in themselves actionable, because the natural consequence of what they impute to the party is damage . ").

Claims for libel and slander per se (and the availability of presumed or nominal damages) were thus limited to instances in which "the character of the defamatory words and the circumstances of publication" entail that "serious harm in fact" to the plaintiff is "all but certain," yet difficult to prove. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 760 (1985) (plurality opinion) (quoting William Prosser, Law of Torts § 112, at 765 (4th ed. 1971)); *see also* 3 Restatement (Second) of Torts § 620 cmt. b (nominal damages only available for defamation per se). Indeed, Justice Powell emphasized this very point in a defamation case against a credit reporting agency for misreporting that the plaintiff had filed for bankruptcy. *See Dun & Bradstreet, Inc.*, 472 U.S. at 760 (plurality opinion). Therefore, the Solicitor General's contention that defamation law allowed for recovery without injury in fact is wrong.

B. Similarly—and crucially, for purposes of this case and for statutes like the FCRA—Congress cannot manufacture standing simply by offering a bounty to private plaintiffs for bringing suits to enforce the law. Although a bounty may give a plaintiff a concrete interest in the outcome of a suit, this Court has held that an "interest unrelated to

injury in fact is insufficient to give a plaintiff standing." *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 772 (2000). An interest, such as a bounty or an award of attorney's fees, "that is merely a 'byproduct' of the suit itself cannot give rise to a cognizable injury in fact for Article III standing purposes." *Id.* at 773; *see Steel Co.*, 523 U.S. at 107 ("[A] plaintiff cannot achieve standing to litigate a substantive issue by bringing suit for the cost of bringing suit.").

Consistent with these limitations, Congress cannot authorize roving private attorneys general to seek out violations of the law that have caused them no actual injury and prosecute them in court in the hopes of obtaining a bounty. *See Lujan*, 504 U.S. at 576-77; *id.* at 580-81 (Kennedy, J., concurring). To do so would be to "transfer from the President to the courts the Chief Executive's most important constitutional duty, to 'take Care that the Laws be faithfully executed,' Art. II, § 3." *Id.* at 577 (majority opinion); *see also* Tara Leigh Grove, *Standing as an Article II Nondelegation Doctrine*, 11 U. Pa. J. Const. L. 781 (2009); Harold J. Krent & Ethan G. Shenkman, *Of Citizen Suits and Citizen Sunstein*, 91 Mich. L. Rev. 1793 (1993). Article III prevents Congress from authorizing private attorneys general to exercise the discretion of the Executive in "roam[ing] the country in search of" legal violations and deciding which to prosecute in the absence of the legal and political constraints that cabin the democratically-accountable Executive's prosecutorial discretion. *Valley Forge*, 454 U.S. at 487; *see* Grove, *supra*, at 784, 807-09, 828.

C. Statutory damages class actions of this type—where plaintiffs have suffered no injury, or worse,

have actually *benefited*, from the alleged violations—starkly present the precise dangers this Court has repeatedly warned against in its Article III standing cases. *See, e.g.*, *Vt. Agency*, 529 U.S. at 772-73. In such suits, as in a private-attorney-general scheme, eligible plaintiffs are not differentiated from the general public by any injury they have suffered, and the courts are impermissibly enlisted into hearing abstract claims of FCRA violations unconnected to any concrete individual injury. The plaintiffs in these suits do not seek to "obtain[] compensation for, or prevent[], the violation of a legally protected right"; they seek only a bounty for prevailing in the litigation—little different from "a wager upon the outcome." *Id.*

The allegations in this action serve only to highlight this problem. As noted, Respondent claims that Petitioner violated the FCRA by reporting information that overstated his employment status and creditworthiness. First Am. Compl. ¶¶ 31-32, 34. Even though Respondent likely *benefited* from these alleged inaccuracies in the eyes of potential employers and creditors, he seeks to represent a class of "millions of individuals," which, at $100 to $1,000 per violation, seeks aggregate statutory damages in excess of $1 billion. *Id.* ¶ 39, p. 16. In other words, Respondent has no actual concrete interest in this action other than the mere possibility of recovering statutory damages—an outcome directly at odds with longstanding principles of Article III standing.

In such circumstances, Petitioner, like the targets of other no-harm statutory damages suits under the FCRA, is threatened with one of the very dangers Article III's injury-in-fact requirement is designed to

prevent—arbitrary enforcement by plaintiffs who are entirely unaffected by (or even benefited from) the challenged conduct, who lack any accountability, and whose prosecutorial discretion is limited only by the creativity of their claims. *See* Grove, *supra* at 784, 791, 807-09. Entrepreneurial lawyers representing statutory-damages classes will not seek out the defendants and violations that cause the most harm to consumers (as we would expect an accountable Executive Branch to do), but will instead have every incentive to seek out violations that maximize class size—and therefore the aggregated statutory damages bounty—regardless of whether the violations actually injure anyone (or, indeed, even benefit class members). Indeed, these lawyers will likely prefer no-injury classes, since class members will not possess potentially valuable yet highly individualized claims for actual damages that could render the class uncertifiable. And with the *in terrorem* effect of such massive potential damages, opportunistic lawyers need not even bring claims for *actual* violations; so long as the violation is arguable and the class large enough, defendants will be forced to settle or risk bankruptcy.

In short, the Ninth Circuit's erroneous understanding of Article III's limitations on standing would all but erase those limits whenever Congress does not require a plaintiff to prove actual damages, severely undermining the separation-of-powers values protected by Article III, and taking the federal courts well beyond their traditional, proper, and constitutionally authorized function—"decid[ing] on the rights of individuals" and remedying actual

individual injuries. *Lujan*, 504 U.S. at 576 (quoting *Marbury v. Madison*, 1 Cranch 137, 170 (1803)).

CONCLUSION

For the foregoing reasons, the judgment of the Ninth Circuit should be reversed.

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REPLY BRIEF

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SPOKEO, INC.,
Petitioner,

v.

THOMAS ROBINS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* INFORMATION PRIVACY LAW SCHOLARS IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF AMICI 1

SUMMARY OF ARGUMENT 1

ARGUMENT 3

I. The FCRA Represents a Carefully Crafted Bargain 3

A. Uniform National Standards and Preemption of Unpredictable Tort Liability 5

B. Transparency as a Mechanism for Error-Correction 7

C. Enhanced Consumer Remedies to Deter Willful Violations of the FCRA's Transparency and Reasonable Accuracy Standards 10

D. Comprehensive Coverage of Consumer Reporting Activities 15

II. FCRA Violations Are Injuries in Fact. 17

III. Numerous Other Statutes Use a Similar Model to Provide Recourse for Privacy-Related Injuries. 27

TABLE OF CONTENTS

CONCLUSION 31

Appendix A - List of Signatories 1a

TABLE OF AUTHORITIES

CASES

Adiel v. Chase Fed. Savings & Loan Ass'n,
810 F.2d 1051 (11th Cir. 1987) 13

Am. Broad. Cos., Inc. v. Aereo, Inc.,
134 S. Ct. 2498 (2014) 16

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545 U.S. 913 (2005) 16

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No. 3:11-CV-01231-BR, 2014 WL 2123560
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394 U.S. 557 (1969) 28

STATUTES

15 U.S.C. § 1640 13

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15 U.S.C. § 1681b 18, 20

15 U.S.C. § 1681i 18

15 U.S.C. § 1681m 18

17 U.S.C. § 504 12

18 U.S.C. § 2510 29

18 U.S.C. § 2511 29

18 U.S.C. § 2520 29

18 U.S.C. § 2707 29

18 U.S.C. § 2710 28

18 U.S.C. § 2724 30

47 U.S.C. § 227 30

47 U.S.C. § 551 30

STATUTES—continued

Consumer Credit Reporting Reform Act of 1996, Pub. L. 104-208 ..... 9, 12

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INTEREST OF AMICI[1]

Amici curiae are fifteen law professors engaged in significant research and teaching on information privacy law. *See* Appendix A (listing individual law professors joining this brief). This brief addresses issues that are within *amici*'s particular areas of scholarly expertise.

SUMMARY OF ARGUMENT

In enacting the Fair Credit Reporting Act (FCRA), Congress crafted a bargain between aggressive, secretive data-aggregating businesses and the public: if those businesses limited disclosures and made reasonable efforts to adhere to practices ensuring "maximum possible accuracy," they would enjoy a safe harbor from litigation under many state and federal theories. The FCRA's consumer transparency requirements and remedial provisions were designed to encourage steady improvement in consumer reporting practices and to relieve pressure on public enforcement authorities. The Petitioner's claim that Respondent cannot pursue it for its violations of the FCRA

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[1] Each party has consented to the filing of this brief, and copies of the consents have been lodged with the Clerk of the Court. Pursuant to this Court's Rule 37.6, *amici* state that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amici* or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

would unravel that bargain, preserving consumer reporting agencies' broad immunity from suit while diminishing incentives to handle data fairly.

In an era in which employers increasingly practice "hiring by algorithm," inaccurate consumer reports—even those that contain putatively favorable inaccuracies—can cause real economic injury to consumers. Such inaccuracies can lead employers to screen out prospective employees as overqualified or too well-paid. Alternatively, employers may suspect resume inflation and dishonesty if background checks reveal inconsistencies or unearned honors.

More generally, lawmakers historically have recognized and responded to non-economic and dignity-based injuries by creating rights of action to remedy such wrongs in court. The FCRA follows that pattern. In enacting the FCRA, Congress did not create injury but rather recognized the injury worked by improper disclosure and handling of information. Petitioner's argument to the contrary threatens to upset numerous privacy, consumer protection, and other laws.

ARGUMENT

I. The FCRA Represents a Carefully Crafted Bargain.

During the late 1960s, Congress became alarmed by the proliferation of data brokers serving the credit, insurance and employment markets with secret and frequently inaccurate dossiers of personal information. At hearings prior to enactment of the FCRA in 1970, Congress heard horror stories about hidden collections and inappropriate disseminations of consumer information, about the harms that the dissemination of false or inaccurate information had caused, and about affected consumers' inability to combat the continued spread of such information after learning of its existence. *See Fair Credit Reporting: Hearings on S. 823 Before the Subcomm. on Fin. Insts. of the S. Comm. on Banking & Currency*, 91st Cong. 368, 378-81 (1969) (showing and providing transcript of CBS report on the ease with which fictitious companies could obtain consumer reports for non-legitimate purposes); *id.* at 381-424 (statements of consumer witnesses); *Fair Credit Reporting: Hearings on H.R. 16340 Before the Subcomm. on Consumer Affairs of the H. Comm. on Banking & Currency*, 91st Cong. 62-81 (1970) (statement of Prof. Alan Westin) (citing examples); *id.* at 109 (statement of Chairwoman

Leonor Sullivan) (indicating that the subcommittee watched the CBS report).

In enacting the FCRA and in subsequent amendments, Congress sought to resolve these problems explicitly and to give individual consumers redress when consumer reporting agencies have failed to provide transparency to those consumers, have improperly disclosed those consumers' report information, or have willfully or negligently failed to follow reasonable procedures for assuring accuracy of those consumers' reports.

The FCRA represents a careful bargain that could be unraveled by a ruling for Petitioner. First, the statute's "reasonable procedures" and preemption provisions are intended to set sensible national standards for consumer reporting and protect the industry from the risk of prohibitive liability. Second, the statute's transparency provisions are designed to enlist consumers themselves in the process of correcting inaccurate information. Third, the statute's remedial provisions are designed to provide a meaningful deterrent to willful violation of the statute's reasonableness and transparency standards, and to respond to the structural difficulty of proving the extent of injury flowing from conduct in a marketplace whose detailed workings still remain largely invisible to consumers. Finally, the

legislative scheme as a whole indicates clear legislative intent to achieve comprehensive coverage of consumer reporting activities. Petitioner's claim that Respondent cannot pursue it for its violations of the FCRA would vitiate each prong of that bargain.

A. Uniform National Standards and Preemption of Unpredictable Tort Liability

When businesses amass records on hundreds of millions of Americans, both errors and improper disclosures inevitably will result. For that reason, the FCRA does not hold the consumer reporting industry to an unattainable standard of perfection. Instead, Congress chose a different strategy, imposing an affirmative duty to handle data reasonably and fairly. Congress recognized that, absent legal obligation, consumer reporting agencies would have insufficient incentive to incur the costs of ensuring a high degree of accuracy and fairness. *See* Michael E. Staten & Fred H. Cate, *Does the Fair Credit Reporting Act Promote Accurate Credit Reporting?* 23 (Harvard Joint Center for Hous. Studies, Working Paper No. BABC 04-14 2004), *available at* http://www.jchs.harvard.edu/research/publications/does-fair-credit-reporting-act-promote-accurate-credit-reporting.

The FCRA imposes on consumer reporting agencies

the obligations to "maintain reasonable procedures designed to limit the furnishing of consumer reports to the purposes listed" and to "follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates." Fair Credit Reporting Act of 1970, Pub. L. 91-508, § 607, 84 Stat. 1127, 1130-31 (codified as amended at 15 U.S.C. § 1681e (a)-(b)).

At the same time, to protect a then-emerging industry from the imposition of inconsistent obligations and unpredictable liability across multiple jurisdictions, Congress conferred immunity from state law defamation, invasion of privacy, and negligence claims "except as to false information furnished with malice." *Id.* § 610(2), 84 Stat. at 1131-32 (codified as amended at 15 U.S.C. § 1681h(e)). Critically, the FCRA's preemption provision does not seek to foreclose all monetary liability. Instead, Congress replaced an uneven patchwork of state common law rules affording remedies for consumer reporting abuses with a uniform federal remedial scheme.

In claiming that Respondent cannot pursue it for its violations of the FCRA, Petitioner seeks effectively to declare itself exempt from compliance with the statutory standard of reasonableness and from the nationwide remedial scheme that the

statute creates. Under the Petitioner's interpretation of the FCRA, consumer reporting agencies would enjoy the broad immunities conferred by the FCRA while not meeting their end of the bargain to give consumers access to their own reports, limit disclosures of consumer reports to others, and strive for accuracy in compiling consumer reports.

B. Transparency as a Mechanism for Error-Correction

The keystone rights created by the FCRA are the rights of consumers to learn about adverse information and false or inaccurate information in their own consumer reports and to seek correction of that information. *See Fair Credit Reporting*, S. Rep. No. 91-517, at 1-2 (1969). That legislative structure reflects congressional judgment that sunlight is the best disinfectant. The transparency requirements are envisioned as the principal mechanism for policing industry conduct, enlisting consumers themselves in the process of overseeing the statutory requirements of reasonable accuracy and appropriate disclosure.

As the Senate Banking and Currency Committee noted in its 1969 report on the bill that would become the FCRA, Congress wanted "to prevent consumers from being unjustly damaged because of inaccurate or arbitrary information

[and] to prevent an undue invasion of the individual's right to privacy in the collection and dissemination of [his or her] information." *Id.* at 1. The consumer access and adverse action notice requirements were envisioned as the means for attaining that result. *See id.* at 1-2; *see also Consumer Reporting Reform Act of 1994*, H.R. Rep. No. 103-486, at 26, 47 (1994) (explaining intent behind strengthened adverse action requirements). Although the FCRA also can be enforced by a number of federal and state agencies, *see* Pub. L. 91-508, § 621, 84 Stat. at 1134-35 (codified as amended at 15 U.S.C. § 1681s), those agencies do not have knowledge of the underlying facts with respect to particular consumers and thus are poorly placed to determine whether any particular consumer report contains errors and whether any particular consumer is, for example, seeking employment and therefore likely to be harmed by those errors. Public enforcement agencies also lack sufficient resources to pursue all violations. *See* Fed. Trade Comm'n, Consumer Sentinel Network Data Book for January-December 2014 6 (2015) (indicating that FTC received over 35,000 complaints related to consumer reporting in 2014). The primary mechanism for flagging inaccurate information in consumers' records therefore is and must be consumers themselves.

Each time Congress revisited the FCRA, the statute's transparency rights were strengthened, notably by the Consumer Credit Reporting Reform Act of 1996, Fub. L. 104-208, Title II, subtitle D, 110 Stat. 3009-426, and the Fair and Accurate Credit Transactions Act of 2003 (FACTA), Pub. L. 108-159, 117 Stat. 1952. In particular, "during the period leading up to the [FACTA] amendments, the FTC consistently indicated that it received more complaints about consumer reporting errors than any other item." *Amending Fair Credit Reporting Act*, S. Rep. No. 108-166, at 6 (2003). The FACTA reforms were designed to indicate that Congress was serious about transparency. They included "numerous provisions to increase the accuracy of consumer reports by providing consumers greater notice about the content of their reports [and] requir[ing] credit bureaus and furnishers to take additional steps to rid consumer credit reports of inaccurate or incomplete information" reported to them by the affected individuals. *Id.* at 4. The Senate Committee report on FACTA states that "the driving force behind the changes was the significant amount of inaccurate information that was being reported by consumer reporting agencies and the difficulties that consumers faced getting such errors corrected." *Id.* at 5-6.

In continually acting to strengthen the statutory guarantees of transparency and the opportunity to correct false or inaccurate information, Congress has sought to combat the injuries that secret, inaccurate dossiers of personal information can create. Petitioner's claim that Respondent cannot pursue it for its violations of the FCRA, if taken seriously, would prevent the statute's principal error-correction mechanism from operating.

C. Enhanced Consumer Remedies to Deter Willful Violations of the FCRA's Transparency and Reasonable Accuracy Standards

To reinforce the statutory obligations of reasonableness and transparency, Congress enabled consumer suits where consumer reporting agencies acted negligently or willfully. While preempting state tort suits in most cases, Congress also provided a comprehensive suite of federal statutory remedies. As originally drafted, Congress authorized actual damages, court costs, and attorneys' fees for negligent violations, *see* Pub. L. 91-508, § 617, 84 Stat. at 1134 (codified as amended at 15 U.S.C. § 1681o), and enhanced these remedies with the option for punitive damages for willful violations, *see id.* § 616, 84 Stat. at 1134 (codified as amended at 15 U.S.C. §1681n).

Notably, however, although the FCRA's provisions authorizing actual and punitive damages in cases of willful violation manifested a clear legislative intent to hold consumer reporting agencies to certain minimum standards of transparency and accountability, instances of secrecy and abuse continued. In the early 1990s, as Congress began discussing a series of amendments designed to strengthen the law's guarantees, both the House and Senate Committees heard stories of consumers who had tried in vain to remove false and damaging information from their files. *See Amendments to the Fair Credit Reporting Act: Hearing Before the Subcomm. on Consumer Affairs & Coinage of the H. Comm. on Banking, Fin., & Urban Affairs*, 101st Cong. 136-45 (1990) (statement of Edmund Mierzwinski, U.S. Public Interest Research Group); *Consumer Problems with Credit Reporting Bureaus: Hearings Before the Subcomm. on Consumer of the S. Comm. on Commerce, Science, & Transp.*, 102d Cong. 19-33, 75-90 (1992) (statements of consumer witnesses); *The Consumer Reporting Reform Act of 1993—S. 783: Hearing Before the S. Comm. on Banking, Hous., & Urban Affairs*, 103d Cong. 64-66 (1993) (statement of Michelle Meier, Consumers Union).

As a response to this testimony, the amendments ultimately enacted as the Consumer

Credit Reporting Reform Act of 1996, authorized courts to award statutory damages as an alternative to actual damages in cases of willful failure to comply with the FCRA's requirements. Pub. L. 104-208, Title II, subtitle D, § 2412, 110 Stat. at 3009-446 (codified at 15 U.S.C. § 1681n(a)(1)(A)) (authorizing award of "any actual damages sustained by the consumer as a result of the failure or damages of not less than $100 and not more than $1,000").

Congressional authorization of statutory damages does not signal a lack of injury in fact. Rather, it represents congressional recognition of the difficulty of documenting that injury, given the structural characteristics of the offending conduct. Statutory damages provisions throughout the U.S. Code serve a similar purpose. Thus, for example, the Copyright Act authorizes an infringement plaintiff to request "instead of actual damages and profits, an award of statutory damages for all infringements involved in the action, with respect to any one work." 17 U.S.C. § 504(c)(1). Historically, statutory damages for copyright infringement have been used to afford a remedy to copyright owners who could prove infringement but not the resulting damages—for example, because it was not possible to trace the disposition of infringing copies. *See* Pamela Samuelson & Tara

Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 Wm. & Mary L. Rev. 439, 446-47 & n.22 (2009).

Similar problems of proof led Congress to provide for statutory damages in the Truth in Lending Act (TILA) when the cost of credit is inaccurately disclosed. 15 U.S.C. § 1640(a)(2). An early case regarding this provision explained:

> The misrepresentation of the cost of credit may have prevented the debtor from obtaining cheaper credit after comparison shopping. The debtor's actual damages are difficult to ascertain. Nonetheless, the creditor has injured the debtor in his monetary interests by misrepresenting the cost of credit. And the Truth-in-Lending Act avoids the difficulty in calculating damages by providing for liquidated damages of twice the amount of the finance charge.

Porter v. Household Fin. Corp. of Columbus, 385 F. Supp. 336 (S.D. Ohio 1974); *accord Adiel v. Chase Fed. Savings & Loan Ass'n*, 810 F.2d 1051, 1054-55 (11th Cir. 1987) (holding that award of statutory damages was appropriate when actual damages from TILA violation were difficult to prove); *In re Wood*, 643 F.2d 188, 192 (5th Cir. 1980) (explaining

that the TILA allows for statutory damages because actual damages can be difficult to prove).

The statutory damages provisions of the FCRA conform to this pattern. The consumer reporting industry remains structurally opaque to consumers. In particular, the barriers to discovering all of the facts about a dissemination of false or inaccurate information are significant. The FCRA was enacted because consumers were not able to learn who was selling their personal information, nor could they learn who was receiving the data and whether the data was accurate. Data brokers who deny that their activities are covered by the FCRA assert trade secrecy protection for their contracts, customer lists, and profiling algorithms. *See* Office of Oversight & Investigations Majority Staff of S. Comm. on Commerce, Science, and Transp., 113th Cong., *A Review of the Data Broker Industry: Collection, Use, and Sale of Consumer Data for Marketing Purposes* 10-11 (2013); Frank Pasquale, *Black Box Society: The Secret Algorithms that Control Money and Information* 22-42 (2013). These structural attributes of the contemporary consumer reporting industry make the difficulty of proving injury so significant that to require such proof would be to prevent injured consumers—consumers who have suffered real, concrete harms from the

dissemination of secret, inaccurate dossiers and profiles—from recovering a monetary remedy at all.

Petitioner's argument that consumers who have suffered FCRA violations have incurred no federally cognizable injury is disingenuous. It seeks to convert endemic industry secrecy into a federally-conferred entitlement for a rogue business model to continue with impunity its pattern of injurious conduct.

D. Comprehensive Coverage of Consumer Reporting Activities

A final, critical aspect of the balance embodied in the FCRA is comprehensive coverage of activities falling within the general domain of consumer reporting. *See* Pub. L. 91-508, § 602, 84 Stat. at 1128 (codified at 15 U.S.C. § 1681); *see also id.* § 604, 34 Stat. at 1129 (codified as amended at 15 U.S.C. §1681(b)) (authorizing consumer reports to be furnished "under the following circumstances and no other"); S. Rep. No. 91-517, at 2 ("The procedures established in the bill assure the free flow of credit information while at the same time they give the consumer access to the information in his credit file so that he is not unjustly damaged by an erroneous credit report."). The activities in which Petitioner is alleged to have engaged manifest flagrant disregard of the carefully crafted statutory regime.

Although Spokeo purports not to offer the same products as traditional consumer reporting entities such as Experian or Equifax, Spokeo's activities "are substantially similar to those of the companies that Congress [intended] the Act to reach." *Am. Broad. Cos., Inc. v. Aereo, Inc.*, 134 S. Ct. 2498, 2506 (2014) (comparing Internet retransmission of broadcast television programming to retransmission by cable companies, which federal law regulates comprehensively). Insofar as differences exist, they concern the level of care exercised by Spokeo with respect to the data it gathers and provides and the extent of its compliance with fair information practices—precisely those deficiencies now alleged to constitute statutory violations. Moreover, as in other contexts, Spokeo's business model "shows a purpose to cause and profit from third-party acts" in violation of the FCRA's clear limitations. *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 941 (2005). Notwithstanding its pro forma instruction to site users not to violate the law, *see* http://www.spokeo.com/business-uses, the probable scope of those violations is, as in *Grokster*, "staggering." *Id.* at 923.

Spokeo is worried about the possibility of massive liability if the claims by Respondent and others are allowed to go forward. It should be. But

legitimate consumer reporting agencies that comply with the FCRA's clear requirements need have no such fear. This Court has not been swayed by the downside risks to rogue business models in the past, and it should not be swayed now. Moreover, the risk of billion-dollar liability is only theoretical in FCRA litigation. The largest FCRA jury award to date is $18,420,000, and that award was reduced to $1,620,000. *Miller v. Equifax Info. Servs., LLC.*, No. 3:11-CV-01231-BR, 2014 WL 2123560 (D. Or. May 20, 2014). In exchange for the significant benefits of the FCRA bargain, *all* businesses engaged in the consumer reporting activities defined by the statute must also conform to its uniform minimum standards.

II. FCRA Violations Are Injuries in Fact.

A prime motivation for the FCRA was the impact of third party data collection on the employment market and particularly on individual job seekers. The costs to consumers whose information is erroneous can be high, including loss of job opportunities. Those costs are real and concrete, and have only increased since 1970 when Congress passed the FCRA.

In the 20th century, direct contact between job seekers and employers ensured notice to job seekers when consumer reporting processes were initiated. This allowed the FCRA's mechanism for

error-correction to work. Under the FCRA, an employer must obtain authorization from a consumer before procuring his or her consumer report. 15 U.S.C. § 1681b(b)(2). The job seeker would submit personal information through an application process and would consent to having his or her consumer report pulled. If the employer planned to deny the application based on data in the consumer report, the job seeker would be informed, as the FCRA requires, *id.* § 1681b(b)(3), and could explain any errors in the report. If the employer nonetheless declined the applicant on the basis of information in the consumer report, the applicant would be notified, *id.* § 1681m(a), and would have the opportunity to correct any errors in his or her consumer report through the FCRA's dispute process, *id.* § 1681i.

In the 21st century, employers increasingly rely on algorithms to recruit and screen potential employees. Claire Cain Miller, *Can an Algorithm Hire Better Than a Human?*, N.Y. Times, June 25, 2015, at SR4; Vivian Giang, *Why New Hiring Algorithms Are More Efficient — Even If They Filter Out Qualified Candidates*, Business Insider (Oct. 25, 2013, 10:51 AM), http://www.businessinsider.com/why-its-ok-that-employers-filter-out-qualified-candidates-2013-10; Tomas Chamorro-Premuzic, *3 Emerging Alternatives to*

Traditional Hiring Methods, Harv. Bus. Rev. (June 26, 2015), https://hbr.org/2015/06/3-emerging-alternatives-to-traditional-hiring-methods ("Algorithms are also used to translate people's web and social media activity into a quantitative estimate of job potential or fit.").

For recruiting, many employers today search for prospective employees by querying consumer information supplied by consumer information aggregators like Petitioner Spokeo, in effect pre-screening applicants without their awareness. *See, e.g.*, Jeanne Meister, *2014: The Year Social HR Matters*, Forbes (Jan. 6, 2014, 7:21 AM), http://www.forbes.com/sites/jeannemeister/2014/01/06/2014-the-year-social-hr-matters/2/ ("Big Data Lets New Jobs Find You Before You Even Know You're Looking"); Alexandra Chang, *The Most Important LinkedIn Page You've Never Seen*, Wired (April 15, 2013, 9:30 AM), http://www.wired.com/2013/04/the-real-reason-you-should-care-about-linkedin/ (describing one online recruitment tool as "like a two-way mirror where companies and recruiters can see all of your profile information, without you knowing they're checking you out"); George Anders, *Who Should You Hire? LinkedIn Says: Try Our Algorithm*, Forbes (Apr. 10, 2013, 1:31 PM), http://www.forbes.com/sites/georgeanders/2013/04/10/who-should-you-hire-

linkedin-says-try-our-algorithm/ (reporting estimate that "more than half of job prospecting is driven by what the algorithms recommend"); Michael Fertik, *Your Future Employer Is Watching You Online. You Should Be, Too*, Harv. Bus. Rev. (Apr. 3, 2012), https://hbr.org/2012/04/your-future-employer-is-watchi (explaining how algorithms increasingly enable employers to search online for potential job prospects, selecting and rejecting people who have not even applied). Employers need not advertise positions and prospects need not apply. As currently structured, this process of "job prospecting" affords no opportunity for employers to ask "prospects" to authorize the use of their consumer reports or to provide individuals who did not know they were prospects with copies of their reports or adverse action notices. Further, it affords prospects no opportunity to dispute the accuracy of the consumer information queried. Although the FCRA permits narrowly circumscribed forms of pre-screening for credit and insurance offers, 15 U.S.C. §§ 1681a(l) & 1681b(c), it does not permit pre-screening of potential job prospects without their consent.

With respect to screening, when job openings *are* advertised, the cost of responding is so low today that applicants apply in droves, even for jobs for which they are not qualified. Rather than

contacting all potential prospects or interviewing all applicants, employers screen out most. *See* Berrin Erdogan, *Overqualified Employees: Making the Best of a Potentially Bad Situation for Individuals and Organizations*, 4 Indust. & Org. Psychol. 215 (2011); Amy Gallo, *Job Seekers: Get HR on Your Side*, Harv. Bus. Rev. (Nov. 30, 2011), https://hbr.org/2011/11/job-seekers-get-hr-on-your-sid.html. In addition to using information extracted from individual applications for this purpose, employers search online for information posted by the candidate and by others. *See* Alex Rosenblat et al., *Data & Civil Rights: Employment Primer*, Data & Civil Rights, 5 (Oct. 30, 2014), http://www.datacivilrights.org/pubs/2014-1030/Employment.pdf ("According to a 2009 survey by Microsoft, 75% of HR professionals and recruiters in the U.S. reported that their companies have formal policies in place to research job candidates' online reputations; 89% of U.S. recruiters and HR professionals seek out professional online data ...; and 84% think it is appropriate to check online personal data as well.... 70% of HR professionals reported that they rejected candidates after mining their data."); Chamorro-Premuzic, *supra* (explaining that employers use "web scraping" to obtain "[c]andidates' digital footprints," which "include information that [candidates] have deliberately collected and curated

— such as LinkedIn endorsements and recommendations — but also comments, photos, and videos posted by colleagues, clients, friends, and family"). Rather than having to search online sites one by one, many use the services offered by online consumer information aggregators like Petitioner Spokeo. *See* Chad Brooks, *Choosing a Background Check Service: A Buying Guide for Businesses*, Business News Daily (Jan. 8, 2015 9:34 AM), http://www.businessnewsdaily.com/ 7636-choosing-a-background-check-service.html (explaining that many online background check services are not FCRA-compliant, but are inexpensive and provide instant results); Roy Maurer, *Amazon, Staffing Company Sued Under FCRA*, Society for Human Resource Management (May 8, 2015), http://www.shrm.org/hrdisciplines/staffingmanagement/articles/pages/amazon-staffing-company-sued-fcra.aspx (noting that one cause of widespread FCRA violations is that staffing agencies which assist firms with hiring "use the least expensive background check possible").

While in theory employers could ask an applicant for consent before obtaining his or her consumer report for screening purposes, and could seek to determine whether any discrepancy between the application and the consumer report

indicated an inaccuracy in the latter, in practice it may be increasingly common for employers to do neither. *See* Steve Johnson, *Those Party Photos Could Cost You a Job*, Chi. Trib. (Jan. 17, 2012), http://www.chicagotribune.com/lifestyles/ct-tribu-facebook-job-dangers-20120117-column.html (reporting that in a survey of employers that screen applicants' social media sites, "73 percent said they don't give the applicants a chance 'to explain questionable information'"); Adam T. Klein, Testimony at EEOC Meeting of May 16, 2007 (testifying that employers often do not notify applicants when they are rejected on the basis of information in their consumer reports), *available at* http://www.eeoc.gov/eeoc/meetings/archive/5-16-07/transcript.html#12; Lisa D. Grant Harpe, *Are You Putting Your Organization at Risk?*, PeopleClick, 28 (2009), http://www.iowaabi.org/documents/filelibrary/events/social_media/Social_Networks_Employment_Law_eBoo_C3A386C1048E1.pdf (misleadingly advising employers that only third-party recruiters need to comply with the FCRA's consumer notification requirements).

The alleged errors Spokeo distributed in its data about Respondent Robins are among the precise types of errors that cost people job opportunities. Two common grounds for exclusion from the prospect pool or from the applicant pool

are that the consumer is overqualified or that the consumer's past salary was higher than what this employer plans to pay. The common wisdom among employers is that an overqualified employee will not stay in the position for long and therefore will produce high turnover costs for the employer. Erdogan, *supra*, at 215 (explaining that "overqualified" candidates are "considered high risks for turnover and lower performance because of low morale and potential boredom"); Amy Gallo, *Should You Hire an Overqualified Candidate?*, Harv. Bus. Rev. (Mar. 3, 2011), https://hbr.org/2011/03/should-you-hire-an-overqualifi.html ("As politicians and economists puzzle over America's jobless recovery, managers who have started to hire again face another problem: how to handle all the overqualified candidates coming through their doors. The prevailing wisdom is to avoid such applicants."). Employers believe that if an applicant is or was earning more at his or her last job than the employer plans to pay, he or she will not accept an offer and so pursuing that applicant is a waste of the employer's time. Donna Fuscaldo, *How to Negotiate Your Starting Salary*, Glassdoor (Apr. 7, 2014, 7:00 AM), http://www.glassdoor.com/blog/negotiate-starting-salary/ (noting that current or prior salary is "used to screen out candidates that are simply too expensive"). One columnist for an

online job matching service explains that firms use automated tools to screen out candidates with prior salaries that are too high or too low. Jack Chapman, *Salary Negotiation Tips: Disclosure Sabotage*, The Ladders (Feb. 14, 2012), http://www.theladders.com/career-advice/salary-negotiation-tips-disclosure-sabotage ("[T]o whittle down those thousands to just 10 to 50 candidates to be considered for interviews, software is used. Software has no ability to think about salary or candidate qualifications, it's 'in or out.' The employer enters salary parameters and if you're outside those, you're screened out.").

Employers also commonly screen out applicants whose applications contain information that does not mirror information that employers gather about the applicant from other sources. In such cases, the employer may fear that the applicant is careless, dishonest, or even presents a risk of employer liability for negligent hiring. Hester Lacey, *Is That Promising Applicant Genuine? Weeding Out the 50% of CVs that Aren't Accurate*, Forbes (May 27, 2014, 8:20 AM), http://www.forbes.com/sites/hesterlacey/2014/05/27/is-that-promising-applicant-genuine-weeding-out-the-50-of-cvs-that-arent-accurate/ (reporting analysis finding that just over half of applications contain inaccuracies and suggesting that, although

some inaccuracies are mistakes, employers may err on the side of caution out of a concern about reputation risk from bad hires); Gallo, *Job Seekers*, *supra* (characterizing misstated information on applications as "red flags"); Anne Fisher, *10 Ways to Use Social Media in Your Job Hunt*, Fortune (Jan. 13, 2011, 5:47 PM), http://fortune.com/2011/01/13/10-ways-to-use-social-media-in-your-job-hunt/ (advising job seekers to "[c]heck carefully for any discrepancies between your resume and your online profiles...[because] [e]ven a small, innocent error can make you look dishonest or just careless"); Robert Sprague, *Googling Job Applicants: Incorporating Personal Information into Hiring Decisions*, 23 Lab. Law. 19 (2007) (discussing negligent hiring liability concern).

While the injuries to individual consumers resulting from FCRA violations by employers and consumer information aggregators are real, proof of harm likely is impossible for those consumers to obtain. Data brokers that refuse to acknowledge their roles as consumer reporting agencies make it impossible for consumers to inspect logs reflecting access by prospective employers. As a result, even a consumer who knows his or her profile contains inaccuracies and sues to correct them cannot ascertain whether any particular employer accessed that profile and declined to hire the

consumer on the basis of those inaccuracies. Thus, for example, whether any particular employer used Spokeo's erroneous data to weed out Robins is probably unknowable unless Spokeo itself tracks the results of employer searches of its consumer files and can recreate the counterfactual circumstances that would have occurred had Robins's data been accurate.

Contemporary practices of hiring by algorithm, without notice to the affected individuals and without concern or accountability for decisions based on error or mistake, are precisely the sort of conduct that Congress enacted the FCRA to address. And the combination of real, concrete injury with impossible-to-obtain proof is precisely the reason that Congress granted affected consumers the right to sue for statutory damages in cases involving willful failures to comply with the FCRA's uniform requirements.

III. Numerous Other Statutes Use a Similar Model to Provide Recourse for Privacy-Related Injuries.

A broad ruling in this case would disrupt established privacy law well beyond the boundaries of the FCRA. Many other statutory regimes rely on private rights of action as a sole or significant enforcement mechanism.

As one example, consider the Video Privacy Protection Act (VPPA), 18 U.S.C. § 2710. The VPPA, enacted in 1988 and amended most recently in 2013, prohibits the unauthorized disclosure of information identifying the videos a customer has viewed, rented, or purchased. *Id.* at § 2710(b). Such disclosures violate core values of personal autonomy and expressive freedom, and therefore cause injury-in-fact even if they do not result in provable reputational harm or emotional distress. *See generally Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (identifying a First Amendment right to "possession of printed or filmed matter in the privacy of a person's own home"); Neil Richards, *Intellectual Privacy* 132-33 (2015); William McGeveran, *The Law of Friction*, 2013 U. Chi. Legal F. 15, 39-46 (2013). Indeed, the invasion of Judge Robert Bork's privacy that motivated Congress to enact the VPPA in the first place, *see* Richards, *supra*, at 132, was a significant injury even absent proof of such additional, consequential harms. An exclusionary rule in the VPPA prevents admission of illegally obtained records in evidence, 18 U.S.C. § 2710(d), but the statute contains no other criminal or regulatory enforcement mechanism. A broad ruling in this case could foreclose the private suits Congress envisioned as VPPA remedies.

Another example is the Wiretap Act, 18 U.S.C. § 2510 *et seq*. This statute, enacted in 1968 and amended in the Electronic Communications Privacy Act of 1986, Pub. L. 99-508, 100 Stat. 1848, prohibits interception, use, or disclosure of the contents of communications obtained from telephone and computer networks. 18 U.S.C. §§ 2511(a)-(c). Unlike the VPPA, the Wiretap Act provides for public enforcement. *Id.* But from the start, Congress has authorized parallel civil enforcement by any "person whose communication is intercepted, disclosed, or intentionally used in violation" of the law. *Id.* § 2520(a); *see also id.* § 2707 (authorizing civil enforcement of the Stored Communications Act). Like the FCRA, the Wiretap Act specifies statutory damages as an alternative to actual damages. *Id.* § 2520(c)(2)(B). The Wiretap Act was the result of decades of concern and debate about law enforcement agencies' uses of electronic surveillance technologies. *See generally* Priscilla M. Regan, *Legislating Privacy: Technology, Social Values, and Public Policy* (1995). In the law it enacted and later amended, Congress recognized the concrete and significant injury visited on individuals whose private communications—whether in the form of voice or email messages—are taken by unauthorized others. *See Bartnicki v. Vopper*, 532 US 514, 553-55 (2001) (Rehnquist,

C.J., dissenting) (extolling role of Wiretap Act in protecting "important interests of deterring clandestine invasions of privacy and preventing the involuntary broadcast of private communications"). The law has served as a great bulwark for personal privacy in an age of rapidly changing modern communication. Its protections could be vitiated if the Court narrows significantly the ability of Congress to recognize and remedy privacy injuries.

The VPPA and Wiretap Act are only two examples of privacy statutes that rely significantly on private civil enforcement, and that therefore would be undermined by a holding that ignored the reality of privacy injury-in-fact. Others include the Telephone Consumer Protection Act, 47 U.S.C. § 227(b)(3); the Cable Communications Privacy Act, 47 U.S.C. § 551(f)(1)-(2); and the Drivers' Privacy Protection Act, 18 U.S.C. § 2724(a)-(b).

Congress did not "create" injury in any of these statutes. Rather, in each case it simply recognized privacy injuries-in-fact occurring in new technological contexts, delineated corresponding legal violations, and created private civil rights of action as remedies. This it was constitutionally empowered to do. The Court should not second-guess considered legislative judgments about the desirability of affording such remedies.

CONCLUSION

For the foregoing reasons, *amici curiae* information privacy law scholars urge this Court to protect the privacy rights of millions of Americans by affirming the decision below.

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REPLY BRIEF

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SPOKEO, INC.,

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v.

THOMAS ROBINS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI* 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 5

I. This Court Should Not Rewrite *Havens Realty v. Coleman* and Other Cases Providing For Broad Standing To Enforce Civil Rights Laws To Add New Standing Requirements Not Articulated In Those Cases 5

II. Following *Havens* Here Would Be Consistent With This Court's Well-Established Standing Jurisprudence and Would Pose No Separation of Powers Problems 15

CONCLUSION 22

TABLE OF AUTHORITIES

CASES

Babbitt v. United Farm Workers Nat'l Union,
442 U.S. 289 (1979) 17

Bangerter v. Orem City Corp.,
46 F.3d 1491 (10th Cir. 1995) 6

Bennett v. Spear,
520 U.S. 154 (1997) 20

Cent. Ala. Fair Hous. Ctr., Inc. v. Lowder Realty Co.,
236 F.3d 629 (11th Cir. 2000) 6

City of Chicago v. Matchmaker Real Estate Sales Ctr., Inc.,
982 F.2d 1086 (7th Cir. 1992) 12

Evers v. Dwyer,
358 U.S. 202 (1958) 12

Fair Hous. of Marin v. Combs,
285 F.3d 899 (9th Cir. 2002) 6

FEC v. Akins,
524 U.S. 11 (1998) 17

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.,
528 U.S. 167 (2000) 16

Gladstone, Realtors v. Vill. of Bellwood,
441 U.S. 91 (1979) *passim*

Gratz v. Bollinger,
539 U.S. 244 (2003) 16

Havens Realty Corp. v. Coleman,
455 U.S. 363 (1982) *passim*

Heckler v. Mathews,
465 U.S. 728 (1984) 9, 17

Hooker v. Weathers,
990 F.2d 913 (6th Cir. 1993) 6

Lincoln v. Case,
340 F.3d 283 (5th Cir. 2003) 6

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992) 17, 18

Meese v. Keene,
481 U.S. 465 (1987) 16

Newman v. Piggie Park Enterprises, Inc.,
390 U.S. 400 (1968) 20

Ne. Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville,
508 U.S. 656 (1993) 13

Pierson v. Ray,
386 U.S. 547 (1967) 12

Plains Commerce Bank v. Long Family Land and Cattle Co.,
554 U.S. 316 (2008) 16

Pub. Citizen v. Department of Justice,
491 U.S. 440 (1989) 17

Ragin v. Harry Macklowe Real Estate Co.,
6 F.3d 898 (2d Cir. 1993) 6

Sierra Club v. Morton,
405 U.S. 727 (1972) 16

Spann v. Colonial Vill., Inc.,
899 F.2d 24 (D.C. Cir. 1990) 6

Sprint Commc'ns Co., L.P v. APCC Servs., Inc.,
554 U.S. 269 (2008) 16

Summers v. Earth Island Inst.,
555 U.S. 488 (2009) 16, 19

Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.,
135 S. Ct. 2507, 2015 U.S. LEXIS 4249 (June 25, 2015) 4, 6

Trafficante v. Metro. Life Ins. Co.,
409 U.S. 205 (1972) 3, 9, 15, 20

United States v. Balistrieri,
981 F.2d 916 (7th Cir. 1992) 6

Vt. Agency of Natural Res. v. United States ex rel. Stevens,
529 U.S. 765 (2000) 16

Vill. of Bellwood v. Dwivedi,
895 F.2d 1521 (7th Cir. 1990) 13

Warth v. Seldin,
422 U.S. 490 (1975) 1

CONSTITUTION

U.S. Const. Amend. I 17

U.S. Const. Art. II 21

U.S. Const. Art. III *passim*

STATUTES AND LEGISLATIVE MATERIAL

15 U.S.C. § 1681n 13

15 U.S.C. § 1681n(a) 18

15 U.S.C. § 1681o 13

42 U.S.C. § 3601, *et seq.* (2011) (Fair Housing Act) *passim*

42 U.S.C. § 3604(d) 3, 8

42 U.S.C. § 3613(a)(1)(A) 3

Fair Housing Amendments Act of 1988, Pub. L. 100-430, 102 Stat. 1619-39 (1988) 4

Hearings on S. 1358, S. 2114 and S. 2280 Before the Subcomm. on Housing and Urban Affairs of the Senate Comm. on Banking and Currency, 90th Cong., 1st Sess. (1967) (statement of Robert Weaver, Sec. of U.S. Dep't of Housing and Urban Dev.) 11

RULES

Sup. Ct. R. 37.3 1

Sup. Ct. R. 37.6 1

OTHER AUTHORITIES

DEBBIE G. BOCIAN, ET AL., CENTER FOR RESPONSIBLE LENDING, UNFAIR LENDING: THE EFFECT OF RACE AND ETHNICITY ON THE PRICE OF SUBPRIME MORTGAGES (2006) 7

WILLIAM H. FREY, AMERICA'S DIVERSE FUTURE: INITIAL GLIMPSES AT THE U.S. CHILD POPULATION FROM THE 2010 CENSUS (2011), *available at* http://www.brookings.edu/~/media/research/files/papers/2011/4/06-census-diversity-frey/0406_census_diversity_frey.pdf 6

DOUGLAS MASSEY & NANCY DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS (1993) 7

RESIDENTIAL SEGREGATION AND HOUSING DISCRIMINATION IN THE UNITED STATES: VIOLATIONS OF THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION, A REPORT TO THE U.N. COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION (2008), *available at* http://www.nationalfairhousing.org/FairHousingResources/ReportsandResearch/tabid/3917/Default.aspx 6

Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U.L. Rev. 881 (1983) 17

ROBERT G. SCHWEMM, HOUSING DISCRIMINATION: LAW AND LITIGATION § 2.3 (2010) 8

MARGERY A. TURNER, ET AL., REPORT TO THE U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, DISCRIMINATION IN METROPOLITAN HOUSING MARKETS: NATIONAL RESULTS FROM PHASE I HDS 2000 (2002) 6, 7

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, HOUSING DISCRIMINATION AGAINST RACIAL AND ETHNIC MINORITIES (2012), *available at* http://www.huduser.org/portal/Publications/pdf/HUD-514_HDS2012.pdf 6

JOHN YINGER, CLOSED DOORS, OPPORTUNITIES LOST: THE CONTINUING COSTS OF HOUSING DISCRIMINATION (1995) 7

INTEREST OF *AMICI*[1]

Amici are civil rights organizations committed to the effective enforcement of anti-discrimination laws, particularly fair housing laws, and the preservation of access to the courts for victims of discrimination.

The Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee") is a nonprofit civil rights organization that was founded in 1963 by the leaders of the American bar, at the request of President Kennedy, to help defend the civil rights of racial minorities and the poor. The Lawyers' Committee has independent local affiliates in Boston, Chicago, Denver, Los Angeles, Philadelphia, San Francisco, Jackson, MS, and Washington, D.C. Among its fields of specialization, the Lawyers' Committee works with communities across the nation to combat, protest, and remediate discriminatory employment, voting, education, housing, and lending practices, including consumer protection practices that adversely affect minorities. In the past, the Lawyers' Committee has been involved as amicus curiae in cases before the Supreme Court involving standing issues in fair housing cases. *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), and *Warth v. Seldin*, 422 U.S. 490 (1975).

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* state that no counsel for a party authored this brief in whole or in part, and no person or entity, other than *amici*, made a monetary contribution to the preparation or submission of the brief. Pursuant to Supreme Court Rule 37.3, *amici* note that counsel for Petitioner and for Respondent both have consented to the filing of this brief.

The National Fair Housing Alliance ("NFHA") is a consortium of private, nonprofit fair housing organizations, state and local civil rights groups, and individuals. NFHA was founded in 1988 to identify and eliminate discrimination in housing markets and ensure equal access to housing for all people protected by national, state, and local civil rights laws. Through education, outreach, policy initiatives, advocacy, and enforcement, NFHA promotes equal housing and equal lending opportunities. Relying on the Fair Housing Act and Supreme Court standing decisions interpreting it, including *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), and *Gladstone, Realtors v. Vill. of Bellwood*, 441 U.S. 91 (1979), NFHA and its members have undertaken important enforcement initiatives across the country, including suits against private landlords and property management companies who provide false information and engage in discriminatory practices discovered as a result of fair housing "testing." *Havens*, 455 U.S. at 373. Those efforts have contributed significantly to the nation's efforts to eliminate discriminatory housing practices.

SUMMARY OF THE ARGUMENT

Amici Lawyers' Committee and NFHA submit this brief in support of Respondent. They do so because they are concerned that Petitioner, though not explicitly asking this Court to overrule or modify Fair Housing Act decisions that have been critical to vigorous enforcement of that Act and other civil rights laws, makes arguments that may be in tension with those decisions. *Amici* ask this Court to reaffirm its settled doctrine that Congress can identify and define new classes of injuries, the invasion of which will

create injury for purposes of Article III standing without a further showing of other harm.

This Court has applied that doctrine with respect to the landmark Fair Housing Act of 1968. That law, among other things, bars certain false statements – such as false representations that housing is not available – from being made because of race or other protected classification. *See* 42 U.S.C. § 3604(d). The Act creates a private right of action for any party "aggrieved" by conduct it makes unlawful. 42 U.S.C. § 3613(a)(1)(A).

In a trilogy of important cases construing the Fair Housing Act, this Court found that the Act authorizes, and Article III permits, challenges to discriminatory practices brought by plaintiffs beyond those directly excluded from housing. First, it found that white tenants may challenge the exclusion of black would-be residents, *see Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 208-10 (1972). Next, it recognized that both a village and its current residents could challenge racial steering practices that excluded would-be new residents. *Gladstone, Realtors v. Vill. of Bellwood*, 441 U.S. 91, 109-15 (1979).

Finally, this Court recognized that "testers" – people who seek information about the availability of housing though they have no intention of making a bona fide offer for that housing – may challenge false information given to them because of race or other protected characteristics. *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982). It found that Congress intended for testers to have standing and that Congress did so to make the Fair Housing Act effective in combatting the systemic problem that those seeking to maintain

segregated housing often lie about housing's availability. Once Congress identified that problem and created a broad right of action to combat it, this Court found that Article III standing required no more than a showing that a plaintiff had experienced a violation of the statutory right. Article III did not require a further showing that the tester plaintiff had suffered additional harm, such as emotional distress.

These rulings gave force to Congress's intent that the Act would meaningfully address widespread, entrenched racial segregation and discrimination in the nation's housing markets. See *Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 135 S. Ct. 2507, 2015 U.S. LEXIS 4249 (June 25, 2015) (recounting historical conditions that led to passage of the Fair Housing Act). Congress since then has continually recognized the need for effective private enforcement of civil rights protections, including in its adoption of the Fair Housing Amendments Act of 1988, Pub. L. 100-430, 102 Stat. 1619-39 (1988), strengthening the Act's enforcement provisions, and adding protections for persons with disabilities and families with children.

Petitioner now asks this Court to limit Congress's authority to identify and define rights previously unrecognized by the law and then create private rights of action to remedy violations. Petitioner argues that, in addition to showing a violation of the right created by Congress, a plaintiff must *also* show some other type of harm in order to have Article III standing. Thus, Petitioner argues, it is insufficient that Mr. Robins has alleged that Petitioner willfully propagated false information about him in violation of the Fair Credit

Reporting Act; instead, Petitioner contends, Mr. Robins must also allege that he suffered some other harm (Petitioner does not spell out what harm would suffice) as a result of that violation.

This Court has never required an additional showing of harm beyond that specified by Congress, and it should not do so in this case. Instead, following *Havens*, this Court should find it sufficient that Respondent has alleged that he was the victim of the exact type of false statements that Congress found sufficiently harmful that it banned them and created a private right of action for those who are the subject of them. It should decline Petitioner's invitation to graft onto the statute an additional element regarding harm that Congress did not want, that courts are ill equipped to enforce without legislative guidance, and that would undermine the effectiveness of the statutory scheme.

ARGUMENT

I. This Court Should Not Rewrite *Havens Realty v. Coleman* and Other Cases Providing For Broad Standing To Enforce Civil Rights Laws To Add New Standing Requirements Not Articulated In Those Cases

This Court, in *Havens Realty Corp. v. Coleman,* 455 U.S. 363 (1982), unanimously held that fair housing testers can have standing to sue under the Fair Housing Act, 42 U.S.C. § 3601, *et seq.* (2011).[2] For over

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[2] The Court defined testers as "individuals who, without an intent to rent or purchase a home or apartment, pose as renters or purchasers for the purpose of collecting evidence of unlawful steering practices." 455 U.S. at 373.

thirty years, federal courts have followed *Havens* in cases brought to enforce Congress's fair housing mandate.[3] Broad standing to privately enforce the Fair Housing Act remains essential today, as the nation's housing market continues to be marked by a high degree of segregation and widespread discriminatory practices. "Much progress remains to be made in our Nation's continuing struggle against racial isolation." *Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project*, 135 S. Ct. at 2525.[4] *Havens* remains

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[3] See *e.g.*, *Lincoln v. Case*, 340 F.3d 283, 289 (5th Cir. 2003); *Fair Hous. of Marin v. Combs*, 285 F.3d 899, 902 (9th Cir. 2002); *Cent. Ala. Fair Hous. Ctr., Inc. v. Lowder Realty Co.*, 236 F.3d 629, 639 (11th Cir. 2000); *Bangerter v. Orem City Corp.*, 46 F.3d 1491, 1497 (10th Cir. 1995); *Ragin v. Harry Macklowe Real Estate Co.*, 6 F.3d 898, 904 (2d Cir. 1993); *Hooker v. Weathers*, 990 F.2d 913, 915 (6th Cir. 1993); *United States v. Balistrieri*, 981 F.2d 916, 929 (7th Cir. 1992); *Spann v. Colonial Vill., Inc.*, 899 F.2d 24, 27 (D.C. Cir. 1990).

[4] *See generally* U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, HOUSING DISCRIMINATION AGAINST RACIAL AND ETHNIC MINORITIES (2012), *available at* http://www.huduser.org/portal/Publications/pdf/HUD-514_HDS2012.pdf; WILLIAM H. FREY, AMERICA'S DIVERSE FUTURE: INITIAL GLIMPSES AT THE U.S. CHILD POPULATION FROM THE 2010 CENSUS 8-11 (2011), *available at* http://www.brookings.edu/~/media/research/files/papers/2011/4/06-census-diversity-frey/0406_census_diversity_frey.pdf; RESIDENTIAL SEGREGATION AND HOUSING DISCRIMINATION IN THE UNITED STATES: VIOLATIONS OF THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION, A REPORT TO THE U.N. COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION (2008), *available at* http://www.nationalfairhousing.org/FairHousingResources/ReportsandResearch/tabid/3917/Default.aspx; MARGERY A. TURNER, ET AL., REPORT TO THE U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, DISCRIMINATION IN METROPOLITAN HOUSING MARKETS: NATIONAL

critically important to achievement of Congress's ambitious goal of ending our long history of segregation and creating a fair, truthful, open, and non-discriminatory housing market.[5]

While purporting to follow *Havens*, Petitioner characterizes that case in a manner that is inconsistent both with *Havens* itself and other Fair Housing Act jurisprudence. Petitioner erroneously suggests that *Havens* found tester standing appropriate only because the tester "was the direct victim of discrimination" and so must have suffered stigmatic and other harms. Petitioner's Br. at 41. This is a misreading of *Havens*, which makes no such finding, and this Court has specifically rejected attempts to create a "direct victim" requirement for enforcement of the Fair Housing Act's protections.

Havens presented the question whether testers have standing to sue under Section 804(d) of the Fair Housing Act, 455 U.S. at 373, which provides that it is unlawful:

> [t]o represent to any person because of race, color, religion, sex, or national origin that any

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RESULTS FROM PHASE I HDS 2000 (2002); DEBBIE G. BOCIAN, ET AL., CENTER FOR RESPONSIBLE LENDING, UNFAIR LENDING: THE EFFECT OF RACE AND ETHNICITY ON THE PRICE OF SUBPRIME MORTGAGES (2006).

[5] For the history of housing discrimination in the United States see JOHN YINGER, CLOSED DOORS, OPPORTUNITIES LOST: THE CONTINUING COSTS OF HOUSING DISCRIMINATION (1995); DOUGLAS MASSEY & NANCY DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS (1993).

> dwelling is not available for inspection, sale or rental when such dwelling is in fact so available.

42 U.S.C. 3604(d). The case involved two testers, one white and one black. 455 U.S. at 368. The Complaint alleged that on four separate occasions the black tester had been told (untruthfully) by the defendant that apartments were not available, while the white tester was told (truthfully) that apartments were available. *Id.* at 374 (citing App. 16, ¶ 13). The Court found that the black tester who received false information because of race had experienced a violation of the statute and so had standing under Article III; by contrast, the white tester who received accurate information had not experienced a statutory violation and so did not have standing. *Id.* at 374-75.

As these results suggest, *Havens* found that the presence or absence of Article III standing turned entirely on whether a tester had suffered "injury to her statutorily created right to truthful housing information." 455 U.S. at 374. The Court stated that "a tester who has been the object of a misrepresentation made unlawful under § 804(d) has suffered injury in precisely the form the statute was intended to guard against " *Id.* at 373.[6] And it

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[6] In addition to tester standing, *Havens* also reaffirmed the concept of "neighborhood" standing, where a black or white resident might show that the racial steering practices of the defendants deprived her of the benefits of living in an integrated community, which is a cognizable injury for purposes of Article III standing. 455 U.S. at 375-78. This injury is based on the fact that in the Fair Housing Act Congress identified a valuable interest in integrated neighborhoods, *see* ROBERT G. SCHWEMM, HOUSING DISCRIMINATION: LAW AND LITIGATION § 2.3 (2010), the denial of

observed: "As we have previously recognized, '[the] actual or threatened injury required by Article III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing '" *Id.* This Court thus made clear that the tester's standing rested solely on violation of the right defined by Congress, which was the right not to receive false information about housing on the basis of race or other protected classes.

Petitioner attempts nonetheless to harmonize *Havens* with its position that a Fair Credit Reporting Act plaintiff must demonstrate injury beyond the one that Congress found sufficient to underlie a private cause of action under that statute. Citing several other decisions in which the Court recognized racial discrimination as a form of "concrete harm" because it leads to stigmatization and other non-economic injuries, Petitioner implies that similar reasoning underlies *Havens*. Petitioner's Brief at 41. This amounts to rewriting *Havens*.

To be sure, the Court *could* have described in *Havens* how the plaintiffs suffered the intangible injuries or harms often caused by discrimination, such as losing the benefits of living in integrated communities, *Gladstone, Realtors v. Vill. of Bellwood*, 441 U.S. 91, 112 (1979); *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 210 (1972), or the stigmatization of being classified as "innately inferior," *Heckler v. Mathews*, 465 U.S. 728, 740 (1984). Those are real injuries that, in appropriate cases, can be the basis of

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which will establish injury in fact, *id.*; *see also Gladstone, Realtors v. Vill. of Bellwood*, 441 U.S. 91 (1979).

Article III standing. But *Havens* chose not to rest its decision on such injury. It did not require the tester plaintiffs to articulate some harm different from or in addition to the injury Congress defined. In particular, there is no indication that the tester in *Havens* alleged any emotional distress or humiliation upon learning that she had been given false information or that the Court viewed such a showing as a requirement for tester standing, 455 U.S. at 369.

In upholding broad standing for testers without a further showing of harm, *Havens* affirmed the validity of a choice specifically made by Congress in order to ensure the effectiveness of the Fair Housing Act. Whereas Section 804(a) of the Act – which prohibits discriminatory refusals to sell or rent – requires a "bona fide offer" to rent or purchase, Congress "plainly omitted any such requirement insofar as it banned discriminatory representations. " to "any person." 455 U.S. at 373-74. Congress thus declined to require an additional showing of harm, in order to provide effective challenges to one of the key devices by which housing discrimination was accomplished — the provision of false information. *Id.* at 374 n.14. And this Court found that the receipt of false information about the availability of housing on the basis of race or other protected classification, having been recognized by Congress as sufficient harm for a private right of action, also was sufficient injury for purposes of Article III standing. *Id.* at 373-74.

While nothing in *Havens* or any other part of the Court's jurisprudence requires Congress to make such a record, *Havens* alluded to evidence before Congress showing that the use of discriminatory

misrepresentations about the availability of housing was a particularly widespread and effective device used to maintain segregation. *See* 455 U.S. at 374 n.14 ("Various witnesses testifying before Congress recounted incidents in which black persons who sought housing were falsely informed that housing was not available."). Such misrepresentations not only had the effect of denying particular individuals housing, they had a broader effect on the housing market.

In particular, Congress understood that individuals who actually sought housing were dissuaded from seeking it in certain areas because of the chilling effect of these widespread misrepresentations. Robert Weaver, Secretary of the U.S. Department of Housing and Urban Development, testified that people accustomed to being lied to about the availability of housing were deterred from continuing to seek housing outside of "ghetto" areas: "You know, after a man hits his head up against a brick wall time and time again, he then even doubts when he sees a little opening in that wall lest it be a snare and a delusion."[7] Tester standing thus is vital to combatting the problem; otherwise many of the worst discriminators could effectively insulate themselves from scrutiny or suit by making their own properties – and, indeed, their entire neighborhoods – sufficiently discouraging for those actually seeking housing to even bother trying. Moreover, as *Havens* illustrates, testers working in tandem often are better positioned to detect and

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[7] *Hearings on S. 1358, S. 2114 and S. 2280 Before the Subcomm. on Housing and Urban Affairs of the Senate Comm. on Banking and Currency*, 90th Cong., 1st Sess., 43 (1967) (statement of Robert Weaver, Sec. of U.S. Dep't of Housing and Urban Dev.).

challenge discriminatory practices than is an individual seeking housing; that person knows only that she has been told housing is unavailable, and not that she has received false information based on race. At the same time, as *Havens* also demonstrates, tester standing is still limited to a discrete, constitutionally permissible group of people who are well positioned to bring suit. It does not amount to generalized authority to enforce the law.

Havens not only recognized this important role for testers under the Fair Housing Act, but also cited to earlier cases involving testers who participated in civil rights sit-ins, specifically, *Pierson v. Ray*, 386 U.S. 547, 558 (1967), and *Evers v. Dwyer*, 358 U.S. 202, 204 (1958) (per curiam). *Evers* is particularly instructive. That case involved an African-American passenger who attempted to ride at the front of a bus but was told "to go to the back of the bus, get off, or be arrested," whereupon he left the bus. 358 U.S. at 204. The Court stated that the bus rider was not "bound to continue to ride at the risk of arrest" if he refused to sit in the back, in order to show an "actual controversy." *Id.* The Court further held that the fact that the bus rider "may have boarded this particular bus for the purpose of instituting this litigation is not significant." *Id.*

As *Evers* makes clear, and as subsequent cases have affirmed, the denial of equal treatment on the basis of a protected classification alone constitutes a cognizable injury for Article III purposes, without any showing of further harm caused by the violation. *See, e.g., City of Chicago v. Matchmaker Real Estate Sales Ctr., Inc.*, 982 F.2d 1086, 1095 (7th Cir. 1992) (housing testers had standing where they were treated in a "racially

discriminatory fashion, even though they sustained no harm beyond the discrimination itself") (quoting *Vill. of Bellwood v. Dwivedi*, 895 F.2d 1521, 1526 (7th Cir. 1990)). A black tester who was lied to about the availability of apartments was lied to "because of" her race. This injury is a real one. So is the one experienced by a tester who, because of his race, was not served at a lunch counter. He never has been required to prove that he even wanted that sandwich – much less that the failure to obtain that sandwich caused him further injury – in order to show injury for purposes of Article III standing. Indeed, it is immaterial whether the plaintiff can show that he ultimately would have received the benefit absent the discriminatory treatment. *See Ne. Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993).

Havens should control this case. The injury at issue here – the willful dissemination of untruthful information with respect to a particular consumer in a consumer report[8] – also involves the dissemination of untruthful information, with some level of intent, in a way that Congress has found is systemically harmful when the industry in question is permitted to engage in this conduct. *See* 455 U.S. at 373 ("Congress has thus conferred on all 'persons' a legal right to truthful information about available housing."). Moreover,

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[8] The statutory damages Respondent seeks in this case are available only where the violations of the FCRA are willful. *See* 15 U.S.C. § 1681n. By contrast, damages for negligent violations are available only upon a showing of actual damages, *see* 15 U.S.C. § 1681o, which would seem to satisfy any formulation of Article III's requirements.

Congress crafted the FCRA remedial scheme as it exists today in response to concerns that, if plaintiffs had to prove real damages rather than statutory damages, victims of inaccurate credit reports would have little incentive to sue and credit agencies would have little incentive to comply with the law. *See* Br. for Respondent at 5-6. As in *Havens*, Congress reasonably concluded that requiring plaintiffs to show specific harm beyond a violation of the statute would seriously undermine the effectiveness of the statutory enforcement scheme.

Thus, this Court can resolve this case without categorically deciding whether an additional showing of personal harm beyond the one defined by Congress is ever required to satisfy Article III. *Havens* provides that the violation of a statutory right to the provision of truthful information suffices in a context where Congress reasonably has found both (1) that the widespread provision of false information is particularly damaging and (2) that requiring a plaintiff to show more would be counterproductive to the enforcement scheme. This Court need go no further.

Accordingly, *Amici* submit that this Court need not and should not accept Petitioner's invitation to describe the injury that *could* have been presented by the facts in *Havens* or other cases involving testers. It would be especially inappropriate to recast *Havens* as based on a finding that someone was a "direct victim" of discrimination, since this Court has specifically rejected the argument that anything turns on such a factual showing. *See Gladstone*, 441 U.S. 102-09 (overturning court of appeals decision construing Fair Housing Act to require "direct victim" showing); *id.* at

113-15 (finding such broad standing constitutionally permissible).

II. Following *Havens* Here Would Be Consistent With This Court's Well-Established Standing Jurisprudence and Would Pose No Separation of Powers Problems

Nothing in this Court's jurisprudence over the past 30 years has unsettled the reasoning and continued validity of *Havens*. Both before and after *Havens*, this Court repeatedly has affirmed the principle that Congress can identify new injuries – including intangible injuries and those not recognized under common law – and create causes of action to remedy them consistent with Article III standing requirements. It has required plaintiffs alleging such injuries to show only that they suffered the harm Congress identified, not additional harm found nowhere in the statute.

This Court has recognized a broad range of intangible, non-monetary, nonphysical injuries as adequate bases for Article III standing once identified by Congress, including under the Fair Housing Act. In *Trafficante*, this Court found that white tenants had standing to challenge an apartment complex's exclusion of minorities because they had lost social, business, and professional advantages and suffered embarrassment and economic damages due to living in a non-integrated apartment complex. 409 U.S. at 208-10. Similarly, in *Gladstone*, this Court recognized that both a village and its residents could challenge racial steering practices that robbed the village "of its racial balance and stability" and caused the individuals to lose the social, professional, and economic benefits of living in an integrated community. 441 U.S. at 109-15.

Finally, in *Havens*, this Court recognized both that testers who had no intention of making a bona fide offer nonetheless had standing to challenge false information given to them regarding housing's availability and that a fair housing organization had standing to challenge discriminatory practices that frustrated the accomplishment of its mission and diverted its scarce resources. 455 U.S. at 373-75, 378-79.[9]

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[9] In other contexts, this Court similarly has acknowledged that Congress can identify a broad range of harms that will support Article III standing without abandoning the requirement of injury. *Sierra Club v. Morton*, 405 U.S. 727, 738 (1972). For example, the harm may involve an aesthetic, conservational, or recreational interest. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181-84 (2000) (damage to environmental group members' recreational, aesthetic, and economic interests satisfied Article III requirements, even without showing that environment had actually been harmed); *accord Summers v. Earth Island Inst.*, 555 U.S. 488, 494 (2009) (it will suffice even if the harm affects the "mere aesthetic interests of the plaintiff"). For more examples of the diverse types of harm that have been to satisfy Article III requirements, see, *e.g.*, *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 554 U.S. 316, 326 (2008) (judicially imposed requirement to undo a sale of land and to sell land to a different buyer, even for same amount of money); *Sprint Commc'ns Co., L.P v. APCC Servs., Inc.*, 554 U.S. 269, 274-75 (2008) (payphone operator's contractual claim for payment from long-distance carrier as assigned to billing and collection agency for flat fee regardless of outcome of suit); *Gratz v. Bollinger*, 539 U.S. 244, 262 (2003) (denial of opportunity to compete on an equal basis without regard to race); *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 773-74 (2000) (injury suffered by United States in suit by *qui tam* relator); *Meese v. Keene*, 481 U.S. 465, 473 (1987) (damage to personal, political, and professional reputation of attorney and politician due to Justice Department's designation of films he wished to show as "political

This Court has consistently deferred to Congress's decision to authorize private enforcement to remedy various types of harms, and has appropriately limited its standing inquiry to whether the plaintiff actually has suffered the harm Congress intended to remedy.[10] As Justice Scalia has explained, whether a given plaintiff has Article III standing thus "is largely within the control of Congress." Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U.L. Rev. 881, 885 (1983). "Congress has the power to define new injuries and articulate chains of causation that will give rise to a case or controversy where none existed before " *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 580 (1992) (Kennedy, J., concurring). The limit on Congress's authority is not with respect to the type of injury, but rather the requirement that Congress "identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit." *Id.* And no decision of this Court holds that Congress may authorize suit to redress only those injuries with an analog in common-law jurisprudence. *See* Petitioner

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propaganda"); *Heckler v. Mathews*, 465 U.S. 728, 739-40 (1984) (stigmatization and perpetuation of stereotypes due to discriminatory treatment); *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) (credible threat of prosecution for activity protected by First Amendment).

[10] *See, e.g., Pub. Citizen v. Department of Justice*, 491 U.S. 440, 449 (1989) (Court has "never suggested that those requesting information under [FOIA] need show more than that they sought and were denied specific agency records); *FEC v. Akins*, 524 U.S. 11, 21 (1998) (group of voters suffered injury in fact based on their inability to obtain information that, they contended, was required to be publicly disclosed).

Br. at 22-23. Such a rule would severely and inappropriately inhibit Congress's authority to remedy problems that, at common law, either were unknown or were not considered governmental priorities – including but not limited to housing discrimination. *See Lujan*, 504 U.S. at 580 (Kennedy, J., concurring). Here, Congress created personal FCRA rights and a private right of action for those whose FCRA rights are violated. *See* 15 U.S.C. § 1681n(a). It has "identif[ied] the injury it seeks to vindicate and relate[d] the injury to the class of persons entitled to bring suit." *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring). That should be enough. There is no basis in this Court's jurisprudence for imposing an extra-statutory requirement that persons who are the subjects of the untruthful reports that the FCRA makes unlawful – and who thus have suffered the exact injury recognized and defined by Congress – must also allege *additional* injuries or harms that Congress chose not to make elements of the cause of action. Moreover, Petitioner and their amici make arguments so abstracted from the facts of this case, and the law in question, as to leave unclear what further harm they think plaintiff must plead to satisfy Article III. Petitioner would have this Court simply declare that *some kind* of additional harm must be alleged and then leave the lower courts and litigants at sea, both in FCRA cases and in cases brought under other statutes that arguably would be subject to that new rule.[11]

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[11] Indeed, the briefing of Petitioners and their amici suggest that their real concern is not this individual action, but rather plaintiff's intent to serve as the representative of a large class action. *See, e.g.*, Br. for Chamber of Commerce at 12-26. Whatever the merits of that concern may be as a matter of policy, it is beyond

To be sure, this Court has held that Congress cannot create Article III standing to sue over purely procedural "injuries" that are entirely untethered from any substantive harm. *See Summers v. Earth Island Inst.*, 555 U.S. 488, 495 (2009) (organization may not sue over denial of right to comment on proposed action once that action was cancelled); *id.* at 500 (Kennedy, J., concurring). But here, Congress created a right that is substantive, not procedural. The gravamen of the complaint is that the defendant gave out false information regarding the plaintiff, not that it denied the plaintiff the right to comment on it.

This Court's precedents similarly foreclose Petitioner's argument that continuing to give Congress broad leeway in defining the harm that permits private individuals to invoke judicial authority would pose a "significant separation-of-powers concern." *See* Petitioner's Brief at 26-32. Congress does not purport to give private citizens Article II authority to enforce the laws so long as it confines the private right of action to enforce a right to particular individuals who are uniquely affected by a violation.

Far from finding constitutional concern, this Court repeatedly has upheld and endorsed Congress's authority to authorize "private attorneys general" to

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the scope of Article III jurisprudence. Rather, Petitioners and their amici should direct their attention to Congress, which can determine whether FCRA suits are used for harassment rather than legitimate ends and, if so, how that should affect the scope of the law. *Cf. Gladstone*, 441 U.S. at 108 (searching history of Fair Housing Act for indications "that Congress attempted to deter possible harassment by limiting standing under § 812," and finding none).

enforce the most important and ambitious federal policies. As this Court explained with respect to the Fair Housing Act, "the enormity of the task" of assuring fair housing throughout the entire country precludes the federal government itself from accomplishing it; rather, "the main generating force must be private suits in which . the complainants act not only on their own behalf, but also 'as private attorneys general vindicating a policy Congress considered to be of the highest priority.'" *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 211 (1972).

For private attorneys general to play this vital role requires the sort of expansive but constitutionally permissible standing recognized in *Havens* and other Fair Housing Act jurisprudence. Where appropriately authorized by Congress to combat the most pressing problems, private litigation by a defined set of plaintiffs serves an important role in protecting not only those against whom specific discriminatory acts are directed, but also those in the broader community. *See, e.g., Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 401-402 (1968) (enforcement of the Civil Rights Act of 1964 must rely on private plaintiffs serving the role of "private attorney general" to vindicate federal policy); *Bennett v. Spear*, 520 U.S. 154, 165 (1997) (Endangered Species Act encourages enforcement by "private attorneys general"). The Executive Branch simply does not have the human and financial resources to prosecute and enforce every violation of federal civil law. Accordingly, this Court has made clear many times that Congress, having identified a problem and those best suited to enforce it, may authorize private citizens to challenge specific violations of its laws

consistent with well-settled principles of Article II as well as Article III.

Constitutional issues might arise if Congress purported to give the authority to enforce its laws to people with only an attenuated stake in the controversy. But Congress does not generally do so, nor does this Court generally construe ambiguous statutory language in such a way. Moreover, this Court has had no trouble construing statutory private rights of action within Article III boundaries using ordinary principles of statutory interpretation, leaving no reason for resort to a new clear statement rule. *See* Petitioner Br. at 53-56.

If anything, separation of powers considerations should counsel this Court to reject Petitioner's argument. *See* Respondent Br. at 50-52. This Court has always shown proper deference to Congress's construction of a private right of action to enforce federal law. To require a further showing of harm here would be to rewrite the remedial scheme created by Congress, adding an additional element to the cause of action that Congress did not want and that the courts are ill equipped to implement without the benefit of legislative guidance.

Resolution of this case thus requires this Court to do no more than reaffirm the reasoning of *Havens*, which is fully consistent with this Court's later Article III jurisprudence. This Court should not in any way call into doubt the holding or reasoning of *Havens*, which has been fundamental to successful enforcement of the Fair Housing Act and other civil rights laws. Instead, this Court should respect Congress's deliberate and reasoned decision not to require

plaintiffs to show the specific damage caused by willful violations of the Fair Credit Reporting Act in order to sue for statutory damages.

CONCLUSION

Amici Lawyers Committee and NFHA urge the Court to affirm the judgment below.

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REPLY BRIEF

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In the Supreme Court of the United States

SPOKEO, INC.,

Petitioner,

v.

THOMAS ROBINS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* STATES OF MASSACHUSETTS, CONNECTICUT, DELAWARE, THE DISTRICT OF COLUMBIA, HAWAII, ILLINOIS, MAINE, MARYLAND, MINNESOTA, MISSISSIPPI, NEW MEXICO, NEW YORK, OREGON, AND WASHINGTON IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTERESTS OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. CONSUMERS ARE ROUTINELY HARMED BY THE DISSEMINATION AND USE OF INACCURATE DATA PROFILES 4

A. Vast Amounts of Detailed, Personal Consumer Data Are Collected, Processed, and Sold By the Data Broker Industry 5

B. Businesses Frequently Rely on Data Profiles to Make Decisions With Important Consequences for Consumers 11

C. Error-Prone Consumer Data Profiles Lead to Negative Consequences that Consumers Are Unable to Identify 16

II. THE FCRA IS A CRITICAL TOOL TO PROTECT CONSUMERS FROM THE DISSEMINATION OF INACCURATE DATA PROFILES 19

A. The FCRA Is Intended to Protect Consumers Against the Dissemination of Inaccurate Data Profiles by Data Brokers 21

B. Harm to Reputation or Property Rights, Even Without Proof of Additional Injury, Has Been Long Understood to Create a Judicable Case 22

C. The Dissemination of Inaccurate Personal Data Causes a Substantial Risk of Injury Sufficient for Standing 26

D. Statutory Damages Cases and Private Class Actions Are Needed to Complement the Role of Attorneys General in Protecting Consumers 33

CONCLUSION 37

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623 F.3d 708 (9th Cir. 2010) 34

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15 U.S.C. § 1681(a)(4)	20
15 U.S.C. § 1681(b)	21
15 U.S.C. § 1681a(b)	21
15 U.S.C. § 1681a(d)	21, 26
15 U.S.C. § 1681a(d)(1)	21, 22, 26
15 U.S.C. § 1681a(f)	21, 26
15 U.S.C. § 1681b	26
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15 U.S.C. § 1681n	22
15 U.S.C. § 1681n(a)	26
15 U.S.C. § 1681n(a)(1)(A)	34
15 U.S.C. § 1681n(a)(2)	34
15 U.S.C. § 1681o	22
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Sup. Ct. R. 37.4 1

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INTERESTS OF *AMICI CURIAE*

Amici States[1] file this brief in support of Respondent as a matter of right pursuant to Supreme Court Rule 37.4.

Each of the *Amici* States is charged with protecting the privacy, security, and integrity of its residents' personal data through its enforcement of state and federal consumer protection laws, including the Fair Credit Reporting Act ("FCRA," 15 U.S.C. §§ 1681 *et seq.*) and its state analogues, state unfair or deceptive practices acts, state data breach notification laws, and state data security laws or regulations. These laws prevent and remedy injuries caused to consumers when their personal data is compromised in commerce, whether through security breach, unauthorized disclosure, or inaccuracies.

The *Amici* States seek to ensure that their residents have equal access to opportunities necessary for social and economic well-being, particularly in the areas of credit, employment, housing, and insurance. Increasingly, access to these opportunities is linked to personal data. Accordingly, the *Amici* States share a compelling interest in protecting their residents from suffering harm due to the communication and use of inaccurate personal data in commerce.

Through our enforcement experience, the *Amici* States know that consumers are injured when inaccurate personal data is disseminated to businesses and individuals who rely on this information when

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[1] A list of *Amici* States and their counsel appears on the inside cover.

making decisions about those consumers. Through our efforts helping residents mitigate or avoid these harms, we know the time and expense required of consumers to restore the integrity of compromised personal data and have witnessed that many of those efforts are unsuccessful. We have an interest in ensuring that our consumers can redress these injuries when their statutory rights granted by the FCRA are violated.

SUMMARY OF ARGUMENT

New technologies allow for collection, analysis, and dissemination of vast amounts of digital data about consumers. This data is collected by the "data broker" industry. Data brokers amass personal, comprehensive, and detailed information regarding every consumer in the United States. They compile and sell individualized data profiles to a variety of businesses. In turn, businesses use these profiles to make important decisions about consumers regarding credit, employment, housing, and insurance, among others.

Unfortunately, these data profiles frequently contain errors, and when disseminated, propagate false information regarding consumers. These inaccuracies may determine where one is able to work, whether one will be able to rent or buy a home, or whether one will be able to obtain a car loan. However, the damage done by the publication or sale of an inaccurate data profile is frequently impossible for the affected consumer to detect or quantify. Nearly all of the collection, aggregation, disclosure, and use of the data occur without the consumer's knowledge. Even if a consumer learns of the existence or content of his or her data profile, it is nearly impossible to discover all of the

persons and businesses that have reviewed and relied on the data profile in making decisions affecting the consumer's life. When data brokers communicate inaccurate personal data, affected consumers likely will never know the full extent of the resulting damage.

Congress enacted the FCRA to address the harm caused by the dissemination of inaccurate information about consumers. The statute gives consumers the right to seek redress from data brokers, like Petitioner, who violate the FCRA when communicating and selling inaccurate personal data about them to businesses. In doing so, Congress codified the common-law right to pursue relief for injuries to reputation and property without proof of further harm. By providing this remedy, Congress recognized that the publication of inaccurate data in a consumer report creates a substantial risk of serious adverse consequences for consumers such as: the reasonably foreseeable denial of a mortgage loan; the inability to purchase and insure a vehicle; or the rejection of a job application. Consumers also suffer cognizable harm as a result of the efforts they undertake to mitigate damage from compromised data. These serious injuries more than satisfy the requirements of Article III standing. Because consumers frequently cannot identify or monetize all of the harm caused by inaccurate data profiles, Congress rightly has authorized statutory damages for a willful violation of the FCRA. This private enforcement tool – a vital complement to the enforcement efforts of the *Amici* States – is critical to maintaining consumers' access to opportunities in today's digital economy.

ARGUMENT

I. CONSUMERS ARE ROUTINELY HARMED BY THE DISSEMINATION AND USE OF INACCURATE DATA PROFILES.

An entire industry now exists to collect, aggregate, and sell detailed personal data about each and every one of us. The data that fuels the data broker industry is digital, comprehensive, often quite sensitive, and harvested without our knowledge by numerous entities every day. Once collected, our data is packaged and sold to a variety of companies as purportedly accurate reflections of who we are, who we were, and who we are likely to be. In turn, businesses routinely use these profiles to determine whether we are worthy of credit, employment, housing, or insurance, and, if so, on what terms.

However, decades of experience have demonstrated that consumer data profiles frequently include information that is inaccurate, incomplete, or misleading. Even well-recognized and established consumer data profiles – credit reports – regularly propagate inaccurate consumer data. These mistakes have substantial, everyday consequences for consumers. Yet, the damage done by inaccurate data is nearly impossible to detect or quantify. Even if a consumer identifies and endeavors to correct inaccurate personal data in his or her data profile, he or she may not be aware of all of the adverse decisions already made by specific users of that inaccurate data. Inaccurate data profiles have grave consequences for consumers, but those consequences often remain hidden.

A. Vast Amounts of Detailed, Personal Consumer Data Are Collected, Processed, and Sold By the Data Broker Industry.

New technologies facilitating the rapid collection, analysis, and transfer of digital data about consumers have given rise to the data broker industry.[2] Data brokers (like Petitioner) "collect information, including personal information about consumers, from a wide variety of sources for the purpose of reselling [it] to their customers for various purposes, including verifying an individual's identity, differentiating records, marketing products, and preventing financial fraud."[3] It is a thriving industry, consisting of hundreds to thousands of companies, and it continues to grow.[4]

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[2] *See generally* MCKINSEY GLOBAL INST., BIG DATA: THE NEXT FRONTIER FOR INNOVATION, COMPETITION, AND PRODUCTIVITY (2011), *available at* http://www.mckinsey.com/insights/business_technology/big_data_the_next_frontier_for innovation.

[3] *See* FEDERAL TRADE COMMISSION, DATA BROKERS: A CALL FOR TRANSPARENCY AND ACCOUNTABILITY, at 23-45 (2014) ["FTC DATA BROKER REPORT"], *available at* https://www.ftc.gov/system/files/documents/reports/data-brokers-call-transparency-accountability-report-federal-trade-commission-may-2014/140527databrokerreport.pdf.

[4] *See* GOVERNMENT ACCOUNTABILITY OFFICE, INFORMATION RESELLERS: CONSUMER PRIVACY FRAMEWORK NEEDS TO REFLECT CHANGES IN TECHNOLOGY AND THE MARKETPLACE, GAO-13-663, at 5, 34 (2013) ["GAO REPORT"], *available at* http://www.gao.gov/assets/660/658151.pdf (estimating between 250 and 2,500 existing data brokers, depending on definition applied, and observing a "vast increase in recent years in the number and type of companies that collect and share [consumers'] data with third parties"); *see also*

The volume and specificity of consumer data compiled by the industry is staggering. One data broker claims to have "[m]ulti-sourced insight into approximately 700 million consumers worldwide" and "[d]emographics, life-stage segmentation, brand affinities, and purchase tendencies for nearly every adult consumer in the U.S."[5] Another claims to have "3000 data segments for nearly every U.S. consumer."[6]

Data brokers rarely interact directly with consumers, but instead gather data from various third-party sources, including: government and public records; social media, online activity, and mobile device usage; retail purchases; and secondary or tertiary (or even more remote) sources, including other data brokers.[7]

Data brokers use various data collection methods, nearly all of which occur without the consumer's

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Katy Bachman, *Big Data Added $156 Billion in Revenue to Economy Last Year*, ADWEEK, Oct. 14, 2014, *available at* http://www.adweek.com/news/technology/big-data-added-156-billion-revenue-economy-last-year-153107.

[5] ACXIOM CORP., FORM 10-K at 9 (2015), *available at* https://www.sec.gov/Archives/edgar/data/733269/000073326915000018/f10k.htm.

[6] *See* FTC DATA BROKER REPORT at 47.

[7] *See* U.S. SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION, OFFICE OF OVERSIGHT AND INVESTIGATIONS, MAJORITY STAFF, A REVIEW OF THE DATA BROKER INDUSTRY: COLLECTION, USE, AND SALE OF CONSUMER DATA FOR MARKETING PURPOSES at 10-11, 15-21 (2013) ["SENATE STAFF REPORT"]; FTC DATA BROKER REPORT at 11-15.

knowledge. Consumer data is collected when consumers use applications on their smartphones or tablets, or in the case of geolocation data,[8] just by carrying such devices in their pockets.[9] Consumers' interactions with websites (e.g., search requests, sites visited, links clicked, and purchases made) are tracked and collected by any number of companies using "cookies,"[10] "flash cookies" (which resist consumers' efforts to delete them), or "history sniffers" (which collect web browsing history).[11] Consumer data is also harvested in bulk from the internet using "web scrapers," technology that scans various online sources to collect data reflecting a consumer's activity or

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[8] "Geolocation data" indicates a mobile device's physical location.

[9] *See* GAO REPORT at 24-27.

[10] A "cookie" is a text file placed on a computer when a user visits a website. *See* Chris Jay Hoofnagle, Ashkan Soltani, Nathaniel Good, Dietrich J. Wambach & Mika D. Ayenson, *Behavioral Advertising: The Offer You Cannot Refuse*, 6 HARV. L. & POL'Y REV. 273, 276 (2012).

[11] *See* GAO REPORT at 23-24 (describing various online tracking technologies); *see also* Julia Angwin, *The Web's New Gold Mine: Your Secrets*, WALL ST. J., July 30, 2010, at W1, *available at* http://www.wsj.com/articles/SB10001424052748703940904575395073512989404 (finding top 50 websites in the nation, representing approximately 40% of websites viewed by Americans, installed average of 64 pieces of tracking technology onto visitors' computers, often without warning, to scan and collect, in real-time, a visitor's website activity); *see generally* Hoofnagle, *et al.*, *supra* note 10 (outlining internet tracking technologies).

postings on social media, blogs, and even other data broker websites.[12]

Nearly all of this data collection occurs outside of consumers' control, knowledge, or view. In 2012, prompted by concerns of consumer harm, the Majority Staff of the U.S. Senate Committee on Commerce, Science, and Transportation, Office of Oversight and Investigations, studied the data broker industry. Based on its inquiry, it concluded:

> [C]onsumers going about their daily activities – from making purchases online and at brick-and-mortar stores, to using social media, to answering surveys to obtain coupons or prizes, to filing for a professional license – should expect that they are generating data that may well end up in the hands of data brokers[;] that this data may well be amassed with many other details about them data brokers already have compiled[; and] that data brokers will draw on this data without their permission to construct detailed profiles on them reflecting judgments about their characteristics and predicted behaviors.[13]

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[12] *See* GAO REPORT at 18; FTC DATA BROKER REPORT at 17 (observing that "some data brokers collect publicly available web-based data through web crawlers, which are programs that capture content across the Internet and transmit it back to the data broker's servers").

[13] SENATE STAFF REPORT at 35.

The data collected is detailed, personal, and often sensitive. In addition to demographic information, data brokers track, *inter alia*:

- financial and health status;
- hobbies;
- religious and political affiliations;
- stores visited, shopping habits, and items purchased;
- geolocation;
- online and social media activity;
- financial transactions;
- books read, movies or television shows watched, and music listened to;
- sexual habits and/or orientation;
- type of device used to access the internet; and
- grocery and alcohol purchases.[14]

Data brokers also make and record in a consumer's data profile inferences from raw data (e.g., that a

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[14] *See id.* at 13-15 (showing variety of information collected by data brokers, including, e.g., whether consumer purchases particular shampoo or soft drink; miles traveled in prior weeks; alcoholic beverages consumed, whether consumer owns pets, hunts, maintains juvenile life insurance, or suffers from ailments such as Attention Deficit Hyperactivity Disorder); FTC DATA BROKER REPORT at 11-14 (listing variety of data elements collected by nine data brokers subject to the FTC's inquiry); Pam Dixon & Robert Gellman, *The Scoring of America: How Secret Consumer Scores Threaten Your Privacy and Your Future*, WORLD PRIVACY FORUM (Apr. 2, 2014), at 33-38, *available at* http://www.worldprivacyforum.org/wp-content/uploads/2014/04/WPF_Scoring_of_America_April12014_fs.pdf (listing 187 exemplar types of data elements, and numerous subtypes, used to generate various consumer scores, including information relating to vehicle ownership, lifestyle, interests, activities, medical status, property, and assets).

consumer is a parent based on purchase of baby products). They may also aggregate several raw data points to create new data points, including various "scores" that purport to rate consumers according to attributes considered favorable or unfavorable or predict future behavior or tendencies.[15]

Data brokers also use consumer data to group consumers into categories based on perceived identity, behavior, socio-economic status, or other commonalties.[16] Such segments include, for example, categories labeled "Urban Scramble" or "Mobile Mixers" (referring to segments including high concentrations of Latino and African-American consumers), "Thrifty Elders" (including singles in their late 60's and early 70's in "one of the lowest income clusters"), "Working Class Mom," "Modest Wages," or "Financially Challenged."[17]

Data brokers market these consumer data profiles to businesses across many industries as purportedly accurate proxies for a consumer's identity, socio-

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[15] *See generally*, Danielle Keats Citron & Frank Pasquale, *The Scored Society: Due Process for Automated Predictions*, 89 WASH. L. REV. 1 (2014). Examples of some consumer scores are also described *infra*, Section I.B.

[16] *See* SENATE STAFF REPORT at 21-28 (describing various consumer profiles offered by data brokers); FTC DATA BROKER REPORT at 19-21 (same).

[17] FTC DATA BROKER REPORT at 19-21. *See also* SENATE STAFF REPORT at 24 (other segments also focus on a consumer's perceived economic status, including "American Royalty," "Power Couples," "Established Elite," "Mid-Life Strugglers," "Credit Reliant," or "Zero Mobility").

economic status, or interests. They also market the profiles as reliable predictors of a consumer's future behavior – including whether a consumer will buy a particular product, respond to a particular sales offer, default on a loan, or be a good insurance risk, tenant, or employee.

B. Businesses Frequently Rely on Data Profiles to Make Decisions With Important Consequences for Consumers.

While the commercial use of consumer data profiles is not new, emerging technologies and the digitization of data have dramatically expanded the volume and commercial availability of ever-more detailed data. Businesses now have near-instant access to volumes of data about consumers, on which they rely to make decisions about whether and which products (and on what terms) to offer to consumers.

Insurance companies rely on a wide range of data about consumers to screen out potential "high risk" individuals. Life and health insurers pull data from data brokers' databases to analyze a consumer's shopping habits, exercise interests, and online searches on the theory that such data points are accurate proxies for underwriting risks.[18] Similarly, where not prohibited by state law, auto insurers use credit scores

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[18] *See* Katie Jennings, *How Your Doctor And Insurer Will Know Your Secrets — Even If You Never Tell Them*, BUSINESS INSIDER (July 9, 2014), http://www.businessinsider.com/hospitals-and-health-insurers-using-data-brokers-2014-7; Leslie Scism & Mark Maremont, *Insurers Test Data Profiles to Identify Risky Clients*, WALL ST. J. (Nov. 19, 2010), http://www.wsj.com/articles/SB10001424052748704648604575620750998072986.

as a proxy to identify "high risk" consumers for whom the insurers set higher rates (in some cases up to 116% more on average).[19]

In addition to the more widely-known FICO® score,[20] lenders now rely on new generations of consumer "scores" created by data brokers to identify credit-worthy consumers. Data brokers create such scores by conglomerating various data points about a consumer into a number that purports to accurately predict a consumer's future behavior. They include, for example, "eScores" that claim to allow "companies to effectively segment credit risks" with respect to "consumers who do not have a scoreable [*sic*] credit file with the major credit reporting agencies."[21] Similarly,

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[19] Kathy Kristof, *Bad Credit Can Double Auto Insurance Premiums*, CBS MONEYWATCH (Oct. 25, 2013), http://www.cbsnews.com/news/bad-credit-can-double-auto-insurance-premiums/. *See also* National Association of Insurance Commissioners, *Credit-Based Insurance Scores* (last updated Feb. 27, 2015), http://www.naic.org/cipr_topics/topic_credit_based_insurance_score.htm (noting prevalence of use of consumer credit information in homeowner or auto insurance underwriting, and observing that "FICO estimates approximately 95% of auto insurers and 85% of homeowners' insurers use credit-based insurance scores in states where it is a legally allowed underwriting or risk classification factor").

[20] The FICO® score was developed by Fair, Isaac & Co. in 1956 to predict the likelihood of a consumer defaulting on a debt. *See generally* Martha Poon, *Scorecards as Devices for Consumer Credit: The Case of Fair, Isaac and Company Incorporated*, 55 SOCIOLOGICAL REVIEW, Sept. 10, 2007.

[21] *Credit Risk Assessment*, EBUREAU, http://www.ebureau.com/b2c/credit-risk-assessment#credit (last visited Sept. 8, 2015).

the "ChoiceScore[SM]" is marketed as a way to "help[] marketers identify and more effectively market to underbanked consumers," such as "[n]ew legal immigrants," "recent graduates," "widows," or "[c]onsumers with transitory lifestyles, such as military personnel."[22] The "Consumer View Profitability Score" offers "13 levels with three high-profitability levels" to enable businesses to "select[] the best prospects that will respond and comply with the terms of their Invitation-to-Apply lending, credit, or continuity program offers."[23]

Landlords and employers use "on demand" consumer data profiles to quickly evaluate prospective tenants or employees. One data broker offers landlords access to "superior data and screening technology [to] help [them] lease to the right people," including "comprehensive data about evictions, address[] history, criminal and additional proprietary sources" that "help [them] evaluate the risk of a resident and make a quick decision to fill [their] rental properties."[24] Another offers "the most comprehensive on-demand background check available today" to evaluate prospective

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[22] *Untap New Potential with Underbanked Consumers*, EXPERIAN, http://www.experian.com/marketing-services/data-digest-choicescore.html (last visited Sept. 8, 2015).

[23] *See Enhanced Strategies for Invitation-to-Apply Offers*, EXPERIAN, http://www.experian.com/marketing-services/profitability-score.html (last visited Sept. 8, 2015).

[24] *See CoreLogic SafeRent*, CORELOGIC, http://www.corelogic.com/industry/multifamily-housing-solutions.aspx# (last visited Sept. 8, 2015).

employees or tenants.[25] To further expedite tenant screening, three-digit "tenant scores" that purport to "summarize[] the potential risk of the applicant compared to others" are also available.[26]

Many data brokers, like Petitioner, offer "people search" websites, which they market as an efficient and low-cost (or even free) resource for conducting background screens. For example, one data broker provides an on-line "universal people directory and an information indexing system" containing data pulled from "social media, official public records, publications and user reviews" to "allow[] people to get to know each other and their professional reputation prior to establishing a relationship."[27] Another similar website offers a "Comprehensive Background Check" that reveals "if anyone has a bankruptcy or criminal charges in their history," and advertises "the most detailed reports available to provide security for you, your business and your loved ones."[28] Petitioner specifically

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[25] *See Nationwide Employment Background Check*, TALENTWISE, https://www.talentwise.com/employment-background-check.html?trackit=276 (last visited Sept. 8, 2015); *Nationwide Tenant Background Check*, TALENTWISE, https://www.talentwise.com/tenant-background-check.html?trackit=278 (last visited Sept. 8, 2015).

[26] *See Tenant Score*, MYRENTAL.COM, http://www.myrental.com/products/tenant-score (last visited Sept. 8, 2015).

[27] *See About*, RADARIS, https://radaris.com/page/about (last visited Sept. 8, 2015).

[28] *See Why Perform a Background Check?*, PEOPLEFINDERS.COM, http://www.peoplefinders.com/background-check (last visited Sept. 8, 2015).

targets employers, inviting those "looking to hire someone" to turn to "Spokeo free people search [a]s a great research tool to learn more about prospective ... employees." JA 13 (at ¶ 28).

Particularly for employers, online consumer data provides a tempting shortcut to the traditional application process, offering a way to quickly winnow stacks of resumes. A 2010 survey co-authored by Microsoft found that 98% of the 275 U.S. employers surveyed searched various websites for information to evaluate candidates, with 32% specifically searching websites that aggregate personal data about applicants.[29] Indeed, 75% of those employers considered online data so important that they imposed formal policies mandating hiring personnel to research applicants online.[30] According to a 2015 Carnegie Mellon University study, about one-third of U.S. firms searched online social networks for information about job applicants early in the hiring process, and made hiring decisions based on the search results.[31]

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[29] CROSS-TAB MARKETING SERV. & MICROSOFT CORP., ONLINE REPUTATION IN A CONNECTED WORLD 8 (2010), *available at* http://download.microsoft.com/download/C/D/2/CD233E13-A600-482F-9C97-545BB4AE93B1/DPD_Online%20Reputation%20Research_overview.doc.

[30] *Id.* at 6.

[31] Alessandro Acquisti & Christina M. Fong, *An Experiment in Hiring Discrimination Via Online Social Networks* (July 18, 2015), *available at* http://dx.doi.org/10.2139/ssrn.2031979 (finding "that about one third of employers likely searched online for the candidates' information" and that results of those searches resulted in religious-based bias in certain geographic areas).

Online data about an employment applicant can directly affect whether the applicant will be interviewed or hired. According to a 2009 survey of over 2,600 hiring managers, 45% used social networking sites to research job candidates, with 35% of those employers deciding not to hire candidates based on information they learned through that research. Of that group, 24% disregarded a candidate after obtaining information online suggesting that the candidate was lying about his qualifications.[32]

C. Error-Prone Consumer Data Profiles Lead to Negative Consequences that Consumers Are Unable to Identify.

Consumer reports have been maintained for decades and, for just as long, have contained erroneous or misleading information. In addition to straightforward inaccuracies, early credit reports also contained speculative innuendo analogous to contemporary internet gossip (e.g., a consumer "used 'his hands in an effeminate manner, also talks in an effeminate manner'").[33] Because these reports drove denials of access to credit, employment, housing, and insurance, Congress enacted the FCRA in 1970.

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[32] *Forty-Five Percent of Employers Use Social Networking Sites to Research Job Candidates* (Aug. 19, 2009), CAREERBUILDER, http://www.careerbuilder.com/share/aboutus/pressreleasesdetail.aspx?id=pr519&sd=8/19/2009&ed=12/31/2009 (last visited Sept. 8, 2015).

[33] Frank Pasquale, *Reputation Regulation: Disclosure and the Challenge of Clandestinely Commensurating Computing*, in THE OFFENSIVE INTERNET–PRIVACY, SPEECH, AND REPUTATION, at 111 & n.13 (Levmore, S. & Nussbaum, M. eds. 2010).

Yet, even today, consumer reports continue to propagate inaccurate information. According to a 2012 FTC study, approximately one in four consumers encountered one or more errors in at least one of the credit reports issued by the three national credit reporting bureaus (Equifax, Experian, and TransUnion).[34] The errors identified by the consumers could "potentially change the credit score associated with that credit report."[35] Even the reports of the national credit reporting bureaus – which have long been subject to the FCRA – continue to contain errors. In contrast, many data brokers, like Petitioner, expressly disclaim any obligation to comply with the FCRA (*see* JA 19-20 (at ¶ 56)) and may not maintain any formal policies to allow consumers to correct errors in their data profiles. Lacking even the modest safeguards required by the FCRA, data broker profiles are likely to contain even more inaccuracies than credit reports.

The experience of the *Amici* States echoes the FTC's findings. Our consumers encounter numerous inaccuracies in their credit reports and online data profiles including: incorrect address or age; a

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[34] *See* FEDERAL TRADE COMMISSION, REPORT TO CONGRESS UNDER SECTION 319 OF THE FAIR AND ACCURATE CREDIT TRANSACTIONS ACT OF 2003 at i (2012), *available at* https://www.ftc.gov/sites/default/files/documents/reports/section-319-fair-and-accurate-credit-transactions-act-2003-fifth-interim-federal-trade-commission/130211factareport.pdf.

[35] *Id.*

misattributed criminal record;[36] wrong employer; or business complaints related to another person or company. Data profiles are frequently inaccurate due to identity theft.

Despite the grave consequences that false data profiles carry for consumers, the scope of the damage often remains hidden from them. As the Senate Committee observed, "data brokers ... provide consumers rights of access and control regarding their data that vary widely."[37] Indeed, this "fundamental lack of transparency" coupled with the risk of resulting harms to consumers prompted the FTC to recommend legislation "that would enable consumers to learn of the existence and activities of data brokers and provide consumers with reasonable access to information about them held by th[o]se entities."[38]

Accordingly, identifying the negative consequences of an inaccurate data broker profile can be a difficult – and possibly insurmountable – burden for a consumer. An employer may reject a candidate based on a glance at a data broker's website without the candidate ever knowing. The FTC described this quandary: "if a

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[36] *See* Assurance of Discontinuance No. 09-165, *In re Choicepoint Workplace Solutions Inc., et al.* (Dec. 17, 2009) (resolving investigation by the New York Attorney General's Office and requiring consumer reporting agency to ensure accurate reporting of criminal records of job applicants to prospective employers), *available at* http://www.ag.ny.gov/sites/default/files/pdfs/bureaus/civil_rights/ChoicePoint%20AOD.pdf.

[37] SENATE STAFF REPORT at 12.

[38] FTC DATA BROKER REPORT at 49.

consumer is denied the ability to conclude a transaction based on an error in a [consumer report], the consumer can be harmed without knowing why."[39]

Even if a consumer discovers inaccuracies in his or her data profile maintained by an identifiable data broker – a daunting task itself, given the sheer number of data brokers (many of which do not reveal their data for free) – it can be difficult, if not impossible, for the consumer to trace the flow of the inaccurate information through various users and connect it to the consequences. And while a consumer may strongly suspect that inaccurate information disseminated by an identified data broker was the basis for a specific adverse decision, proving that the decision-maker actually viewed and was influenced by that data is even more challenging.

II. THE FCRA IS A CRITICAL TOOL TO PROTECT CONSUMERS FROM THE DISSEMINATION OF INACCURATE DATA PROFILES.

The FCRA serves a vital purpose – one even more critical now than when it was first enacted in 1970. Even before the advent of the internet, Congress recognized the development of an "elaborate mechanism ... for investigating and evaluating the credit worthiness, credit standing, credit capacity, character, and general reputation of consumers." 15 U.S.C. § 1681(a)(2). This necessitated legislation "to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and

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[39] *Id.* at 48.

a respect for the consumer's right to privacy." *Id.* § 1681(a)(4). In the ensuing 45 years, the "elaborate mechanism[s]" Congress described have evolved into digital algorithms that can aggregate and analyze vast amounts of consumer data to create even more detailed consumer reports, accessible through the internet to anyone at the click of a button. Against this backdrop, the FCRA's procedural and substantive protections, especially those requiring consumer reporting agencies to "follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual," have never been more necessary. *Id.* § 1681e(b).

Consumers need to have the ability to enforce these protections, notwithstanding their difficulties in showing actual damages. The FCRA recognizes that the dissemination of inaccurate consumer information creates a substantial risk of harm, though specific harms are often hard to identify or quantify. In addition, common-law has long protected against damage to reputational or property interests, even without proof of actual injury. Courts also have recognized as sufficient for Article III standing the cost of mitigating the substantial risk of injury due to the dissemination of personal information in the analogous context of a data security breach. If anything, similar and possibly greater cost and effort are required to correct inaccurate information communicated by a data broker.

A. The FCRA Is Intended to Protect Consumers Against the Dissemination of Inaccurate Data Profiles by Data Brokers.

The express purpose of the FCRA is to ensure that "consumer reporting agencies," a term defined to include entities like Petitioner,[40] act responsibly in the "vital role" they have assumed. 15 U.S.C. § 1681(a)(3). The FCRA requires that these agencies adopt minimum "reasonable procedures" that "meet[] the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information[.]" *Id.* § 1681(b).

By definition, a consumer report is "any ... communication ... bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for" a number of enumerated purposes. *Id.* § 1681a(d)(1). Congress created a right for an individual to be free from a credit reporting agency's willful dissemination of inaccurate information in a consumer report. *See id.* §§ 1681e(b), 1681a(d). The FCRA imposes civil liability for that

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[40] "Consumer reporting agenc[ies]" include any person or entity "which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties[.]" 15 U.S.C. § 1681a(f).

dissemination when the agency willfully fails to employ "reasonable procedures to assure maximum possible accuracy" of the information contained therein. *Id.* §§ 1681e(b), 1681n. Congress also gave consumers the right to seek redress in federal court for violations of such requirements. *Id.* §§ 1681n, 1681o, 1681p.

Thus, through the FCRA, Congress recognized the substantial risk of harm to a consumer, albeit often difficult to quantify or prove, when inaccurate information about a consumer is willfully communicated for the purpose of evaluating his or her eligibility for, *inter alia*, credit, employment, or insurance. *See id.* §§ 1681a(d)(1), 1681b(a). Congress made the integrity of a consumer's personal data profile a legally enforceable right and provided a means for redress when inaccurate data is inappropriately shared, collected, or used for important decisions.

The purpose of the FCRA is to protect against the exact conduct at issue in this case – the dissemination of inaccurate profiles describing "a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living." *Id.* § 1681a(d)(1). The FCRA is thus an important tool to protect consumers from abuses by the data broker industry.

B. Harm to Reputation or Property Rights, Even Without Proof of Additional Injury, Has Been Long Understood to Create a Judicable Case.

The injuries resulting from the communication and use of inaccurate personal data are real, particularized, and concrete. It is precisely because of these injuries

that Congress gave consumers the right to seek redress when a consumer reporting agency violates the FCRA's procedural safeguards. Through the FCRA, Congress has exercised its authority to "elevat[e] to the status of legally cognizable injur[y]" these "concrete, *de facto* injuries that were previously inadequate in law[.]"[41] *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 578 (1992).

The *de facto* injuries that Congress has recognized in the FCRA have strong "analogs in our common-law tradition." *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring). The publication of false information can be sufficient to establish standing for traditional common-law defamation claims designed to vindicate reputational injury that can impact one's livelihood. *See, e.g.*, Restatement (Second) of Torts § 573 (Defamation Actionable Irrespective of Special Harm (Defamation Actionable *Per Se*)) (statement ascribing to another characteristics or conduct that would adversely affect his fitness for, *inter alia*, "the proper conduct of his lawful business, trade or profession," subjects speaker to liability "without proof of special harm").[42] This Court has recognized that such claims

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[41] The *Amici* States do not elaborate here on the broader question of whether the violation of any statutory right can, standing alone, suffice to establish cognizable Article III standing. This Court need not reach that question here given the concrete, consequential injuries caused by the dissemination of inaccurate personal data.

[42] *See also* Restatement (Second) of Torts § 559 (1977) (defamatory communications), § 623A (publication of injurious falsehood), § 652D (publicity given to private life), § 652E (publicity placing person in false light).

– allegations of injury by published falsehoods that specifically concern the individual – are "of the sort traditionally amenable to, and resolved by, the judicial process." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102 (1998); *see also Meese v. Keene*, 481 U.S. 465, 474-75 (1987) (holding that "a risk of injury to [one's] reputation" is sufficient injury for Article III standing). Consumer reports are dossiers of our lives – reputational summaries detailing our past educational, financial, purchasing, residential, and social histories – that are routinely used in making judgments that will affect our futures. In effect, Congress, through the FCRA, has elevated and codified the *de facto* common-law right to be free from the publication of false information in the specific context of consumer reports.

Moreover, the common-law has always recognized the right to control one's property without regard to quantifiable harm. Common-law actions for trespass have long vindicated real property rights without proven physical damage,[43] and patent and copyright infringement actions similarly protect intangible intellectual property without the requirement to allege or prove economic damage.[44] Violations of tangible and

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[43] *See, e.g., Marzetti v. Williams*, 1 B. & Ad. 415, 426, 109 Eng. Rep. 842, 846 (K.B. 1830) (Taunton, J.) ("Trespass, *quare clausum fregit*, is maintainable for an entry on the land of another, though there be no real damage, because repeated acts of going over the land might be used as evidence of a title to do so, and thereby the right of the plaintiff may be injured.").

[44] *See, e.g., Rude v. Westcott*, 130 U.S. 152, 167 (1889) (awarding nominal damages where "[n]o legal ground [was] shown for the recovery of specific damages for the alleged infringement of the

intangible property rights are actionable without a showing of damages or harm because the violations are themselves injuries-in-fact. Just as the value of real or intangible property derives in part from the extent to which its owner can exercise control over it, Congress sought through the FCRA to protect a consumer's interest in controlling the integrity of his information – which also has marketable value[45] – when it is

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patents"); *Whittemore v. Cutter*, 29 F. Cas. 1120, 1121 (C.C.D. Mass. 1813) (Story, J.) (holding that patent owner could recover nominal damages from defendant who infringed his patent because, "where the law gives an action for a particular act, the doing of that act imports of itself a damage to the party. Every violation of a right imports some damage, and if none other be proved, the law allows a nominal damage."); *see also* the Copyright Act, 17 U.S.C. § 504(c) (2012) (providing statutory damages for copyright infringement without proof of other injury); *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 341 (1998) (observing "close 18th-century analogues to [17 U.S.C.] § 504(c) statutory damages actions," including "the common law and statutes in England and this country [which] granted copyright owners causes of action for infringement"); *F.W. Woolworth Co. v. Contemporary Arts, Inc.*, 344 U.S. 228, 233 (1952) ("Even for uninjurious and unprofitable invasions of copyright the court may, if it deems it just, impose a liability within statutory limits to sanction and vindicate the statutory policy.").

[45] *See, e.g. Tyler v. Michaels Stores, Inc.*, 464 Mass. 492, 504 n.20 (2013) (concluding that "receipt of unwanted marketing material" due to merchant's collection of personal information in violation of state law was an "invasion of the consumer's personal privacy causing injury or harm" that warranted damages equal to the merchant's profits from use of the information – "a close approximation of the value of the consumer's personal identification information on the open market"). Indeed, consumer reporting agencies by definition furnish reports on individuals "for

communicated in a consumer report.[46] *See* 15 U.S.C. §§ 1681e(b), 1681a(d)(1), 1681b(a).

C. The Dissemination of Inaccurate Personal Data Causes a Substantial Risk of Injury Sufficient for Standing.

Congress recognized that the dissemination of inaccurate personal data creates a substantial risk of injury in the form of adverse decisions relating to, *inter alia*, "credit[,] insurance" or "employment." 15 U.S.C. §§ 1681a(d), 1681b. Thus, when a company fails to use "reasonable procedures" when "prepar[ing] a consumer report" "with respect to any [given] consumer," the FCRA creates a cause of action in favor of "that consumer." *Id.* §§ 1681e(b), 1681n(a). The FCRA "does not require a consumer to wait for unreasonable credit reporting procedures to result in the denial of credit or other consequential harm before enforcing [his or her] statutory rights." *Beaudry v. Telecheck Services*, 579 F.3d 702, 705 (6th Cir. 2009). Nor should it.

Standing does "not uniformly require plaintiffs to demonstrate that it is literally certain that the harms they identify will come about." *Clapper v. Amnesty Int'l USA*, __ U.S. __, 133 S. Ct. 1138, 1150 n.5 (2013).

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monetary fees, dues, or on a cooperative nonprofit basis." 15 U.S.C. § 1681a(f).

[46] Last term, this Court decided a case involving the denial of an individual's statutorily-conferred right to control the integrity of his personal data (specifically, his birthplace) listed on a passport, without explicitly considering the jurisdictional question of whether his injury was sufficient to establish Article III standing. *Zivotofsky v. Kerry*, __ U.S. __, 135 S. Ct. 2076 (2015).

Rather, in some circumstances, as here, a "substantial risk" that the harm will occur, "which may prompt plaintiffs to reasonably incur costs to mitigate or avoid that harm," suffices to establish standing. *Id.*

In a parallel context involving the compromise of consumers' personal information as a result of a data security incident or "data breach" by criminal intrusion, courts have concluded that "customers should not have to wait until hackers commit identity theft or credit-card fraud in order to give the class standing[.]" *Remijas v. Neiman Marcus Group, LLC*, Dkt. No. 14-3122, 2015 WL 4394814, at *4 (7th Cir. July 20, 2015) (citing *Clapper*, 133 S. Ct. at 1147); *see also In re Adobe Sys., Inc. Privacy Litig.*, 66 F. Supp. 3d 1197, 1214 (N.D. Cal. 2014) ("*Adobe*") (also applying *Clapper's* "certainly impending" harm standard). Since hackers "deliberately targeted" the defendants in order to obtain plaintiffs' credit-card information, "[p]resumably, the purpose of the hack is, sooner or later, to make fraudulent charges or assume those consumers' identities." *Neiman Marcus*, 2015 WL 4394814, at *5; *see Adobe*, 66 F. Supp. 3d at 1214 ("[T]he risk that Plaintiffs' personal data will be misused by the hackers who breached Adobe's network is immediate and very real."). Recognizing that such harms "can occur long after a data breach,"[47] the courts in *Neiman Marcus* and *Adobe* held that it is "plausible

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[47] Breach of a Social Security number can increase a consumer's risk of identity theft 18 times. *See* NATIONAL CONSUMERS LEAGUE, THE CONSUMER DATA INSECURITY REPORT: EXAMINING THE DATA BREACH–IDENTITY FRAUD PARADIGM IN FOUR MAJOR METROPOLITAN AREAS 14 (2014), *available at* http://www.nclnet.org/datainsecurity_report.

to infer that the plaintiffs have shown a substantial risk of harm" from the data breach, and that such allegations of future injury satisfy Article III. *Neiman Marcus*, 2015 WL 4394814, at *5; *see Adobe*, 66 F. Supp. 3d at 1215 ("[T]he danger that Plaintiffs' stolen data will be subject to misuse can plausibly be described as 'certainly impending.'").[48]

These same courts have found that mitigation expenses to protect against such reasonably imminent harms also "qualif[y] as a concrete injury." *Neiman Marcus*, 2015 WL 4394814, at *5; *see Adobe*, 66 F. Supp. 3d at 1217 ("[I]n order for costs incurred in an effort to mitigate the risk of future harm to constitute injury-in-fact, the future harm being mitigated must itself be imminent."). Indeed, in the data breach context, efforts and costs to restore the security of one's compromised personal data and avoid identity theft are not insubstantial. The *Amici* States commonly advise consumers[49] to place and pay for security freezes on

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[48] *See also Krottner v. Starbucks Corp.*, 628 F.3d 1139, 1143 (9th Cir. 2010) (holding, pre-*Clapper*, that Starbucks employees alleged "a credible threat of real and immediate harm stemming from the theft of a laptop containing their unencrypted personal data" and that, as a result, they "sufficiently alleged an injury-in-fact for purposes of Article III standing"). As the *Adobe* Court observed, a number of district courts, post-*Clapper*, have concluded that plaintiffs lacked standing in similar contexts when applying a heightened "certainly impending" future injury standard. *See Adobe*, 66 F. Supp. 3d at 1212-16 (evaluating *Clapper's* dual standards, collecting and distinguishing cases, and finding sufficient injury under both standards).

[49] *See, e.g.*, MASSACHUSETTS ATTORNEY GENERAL'S OFFICE, GUIDE ON IDENTITY THEFT FOR VICTIMS AND CONSUMERS (2015), *available at* http://www.mass.gov/ago/docs/consumer/id-theft-guide.pdf;

their credit reports to prevent identity thieves from opening new lines of credit;[50] to file police reports;[51] to place fraud alerts on their credit files (to obtain early warning of new accounts being opened in their name); to pay for credit-monitoring services; to contact fraud departments at their financial institutions and dispute fraudulent charges to avoid being held responsible for them; to close and reopen compromised financial accounts; to change user names and passwords for compromised accounts; and to change the compromised personal information (e.g., obtain new drivers' license numbers or Social Security numbers[52]). Some of these prophylactic steps have associated costs, and all require time and effort and compound the emotional distress of living in a state of heightened alert for identity theft or fraud. As courts have found and as the *Amici* States can attest, these attendant injuries are

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ILLINOIS ATTORNEY GENERAL'S OFFICE, IDENTITY THEFT RESOURCE GUIDE, *available at* http://www.illinoisattorneygeneral.gov/consumers/Identity_Theft_Resource_Guide.pdf.

[50] *See, e.g.*, Mass. Gen. Laws ch. 93, § 62A (requiring credit reporting agencies to freeze consumers' credit files upon request and setting a maximum fee of $5 for each placement, temporary suspension, and lift of such freeze); Cal. Civ. Code § 1785.11.2 (same, with a maximum fee of $10).

[51] *See, e.g.*, Mass. Gen. Laws ch. 93H, § 3 (requiring breached entities to inform consumers of their right to file and obtain a police report).

[52] The steps required to change one's Social Security Number following identity theft are detailed at https://faq.ssa.gov/link/portal/34011/34019/Article/3789/Can-I-change-my-Social-Security-number.

also real and concrete. *See Neiman Marcus*, 2015 WL 4394814, at *5 (holding that purchase of credit-monitoring services at $4.95 for first month, and $19.95 per month thereafter, "easily qualifies as a concrete injury"); *Adobe*, 66 F. Supp. 3d at 1216-17 (concluding that plaintiffs "adequately alleged that they face a certainly impending future harm from the theft of their personal data," and that "the costs ... incurred to mitigate this future harm [including paying for data monitoring services] constitute an additional injury-in-fact").

A similar "substantial risk" of harm exists where consumer reporting agencies disseminate consumer data while failing to maintain the "maximum possible accuracy" of that information. 15 U.S.C. § 1681e(b). Like hackers in the data breach context, third parties deliberately request and pay for the targeted individual's consumer report. The purpose of obtaining a consumer report is, sooner or later, to make a significant decision regarding the consumer based on the purchased personal data. Even supposedly "favorable" inaccuracies can lead to harmful misjudgments when, for example, a consumer is deemed overqualified for a job, ineligible for a needs-based government benefit, or perceived to be untruthful based on contrary information in a consumer report. These determinations may not be immediately apparent or even knowable by a consumer. This is especially true in the case of data brokers (like Petitioner) that disseminate inaccurate

consumer data through a publicly available website to be viewed anonymously by any number of parties.[53]

Even when a consumer does learn that inaccurate personal information has been disseminated in a consumer report, significant time and effort is required to attempt to identify the source of such errors and to correct them, often to no avail. The *Amici* States have worked with numerous consumers concerned that misleading information has been collected about them by online data brokers, like Petitioner. The process to remove or correct such inaccurate data frequently involves repeated telephone calls, letters, emails, collection and submission of authenticating identification documents, and payment of fees, even when *Amici* States' Attorneys General intervene. Often, despite such efforts, the data broker refuses to give consumers access to their personal data or to correct the inaccuracies, and inaccurate personal data

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[53] Indeed, consumer complaints of inaccurate credit reporting and concerns that those practices were resulting in lost credit, employment, housing, and insurance opportunities for consumers, among other concerns, prompted many of the *Amici* States to investigate the practices of the three major credit reporting bureaus. That investigation resolved by an Assurance of Voluntary Compliance, enforceable by thirty-one States, which required the credit reporting bureaus to, *inter alia*, implement various measures to improve credit report data accuracy and dispute procedures. *See, e.g.*, Assurance of Discontinuance, *In re Equifax Info. Serv. LLC, et al.*, No. 15-1480E (Mass. Super. Ct. May 20, 2015). The New York Attorney General's Office reached a separate agreement with the three bureaus that included similar provisions. *See* Settlement Agreement, *In re Experian Info. Solutions, Inc., Equifax Info. Servs., LLC, & TransUnion LLC* (Mar. 8, 2015) *available at* http://www.ag.ny.gov/pdfs/CRA%20Agreement%20Fully%20Executed%203.8.15.pdf.

is republished even after consumers request corrections.

Compared to the mitigation efforts consumers must make when victimized by a data breach, the efforts required to restore the integrity of personal data compromised by a consumer reporting agency can be significantly more challenging. Data brokers obtain a wide variety of data about consumers from various sources, including other data brokers, and then make that information available to any number of anonymous users through the internet. Even if a consumer determines which data broker maintains inaccurate personal data about him or her – which is no small feat[54] – he or she will not readily know where the broker obtained it, and with whom it has been shared.[55] To prevent further dissemination of

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[54] In contrast, consumers in most states receive statutory notice from a specific company when their personal information is compromised in a security breach. *See State Security Breach Notification Laws*, NAT'L CONFERENCE OF STATE LEGISLATURES, http://www.ncsl.org/research/telecommunications-and-information-technology/security-breach-notification-laws.aspx (last visited Sept. 8, 2015).

[55] *See* Ylan Q. Mui, *Little-Known Firms Tracking Data Used in Credit Scores*, WASHINGTON POST (July 16, 2011), http://www.washingtonpost.com/business/economy/little-known-firms-tracking-data-used-in-credit-scores/2011/05/24/gIQAXHcWII_story.html (noting "veil of secrecy surrounding the origins of the information [in a consumer data profile], how it is analyzed and who buys it" and observing that "[c]onsumers have no voice in those decisions, even though the information concerns their lives[,]" and that it can also "penalize them for actions they didn't realize were being tracked, forcing them to pay far higher interest rates or more fees").

inaccurate personal data, however, a consumer must trace the inaccurate data through possibly still other data brokers and finally to the business entities to which it was disseminated and then correct the erroneous information at each step. These efforts require substantial expenditures of time, energy, and resources – additional real and concrete injuries, albeit hard to monetize – and, in the end, may be wholly unsuccessful.

D. Statutory Damages Cases and Private Class Actions Are Needed to Complement the Role of Attorneys General in Protecting Consumers.

As noted above, the "fundamental lack of transparency" characterizing the data broker industry means that it is frequently impossible for a consumer to know the concrete harm caused by the dissemination of inaccurate personal data.[56] Appropriately, the FCRA places the burden of ensuring "maximum possible accuracy" on consumer reporting agencies. 15 U.S.C. § 1681e(b). To require otherwise would set an unreasonably high bar that consumers could only rarely overcome.[57]

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[56] FTC DATA BROKER REPORT at 49.

[57] Of course, because of the substantial public and quasi-sovereign interests at stake, the State Attorneys General are not subject to the same Article III standing limitations as private litigants, and may bring actions under their respective state's consumer protection laws without waiting for their consumers to be injured or having to prove harm. *See Mass. v. Envtl. Prot. Agency*, 549 U.S. 497, 516-526 (2007); *see also* Mass. Gen. Laws ch. 93A, § 4; Conn. Gen. Stat. § 42-110m.

The statutory damages provided in Section 1681n(a)(1)(A) compensates individuals for actual harm resulting from a willful FCRA violation that is hard to identify, monetize, or otherwise quantify. "That [the] actual loss is small and hard to [identify or] quantify is why statutes such as the [FCRA] provide for modest damages without proof of injury." *Murray v. GMAC Mortg. Corp.*, 434 F.3d 948, 953 (7th Cir. 2006); *see also Bateman v. American Multi-Cinema*, 623 F.3d 708, 718 (9th Cir. 2010) (stating, in context of Fair and Accurate Credit Transactions Act ("FACTA"), which incorporates FCRA's statutory damages provision: "The need for statutory damages to compensate victims is plain. The actual harm that a willful violation of FACTA will inflict on a consumer will often be small or difficult to prove."). "That Congress provided a consumer the option of recovering either actual or statutory damages, but not both, supports the presumption that they serve the same purpose." *Bateman*, 623 F.3d at 718 (noting further that Congress's provision for punitive damages in 15 U.S.C. § 1681n(a)(2) in addition to any actual or statutory damages "suggests that the statutory damages provision has a compensatory, not punitive, purpose"); *see also Harris v. Mexican Specialty Foods, Inc.*, 564 F.3d 1301, 1313 (11th Cir. 2009) (concluding that, because FCRA, which is incorporated into FACTA, provides separately for punitive damages, its statutory damages provision is not punitive). The statute makes Congress's legislative judgment clear: a range of $100 to $1000 is necessary to have the desired compensatory and deterrent effect and to achieve the FCRA's important goals. 15 U.S.C. § 1681n(a)(1)(A); *see also Bateman*, 623 F.3d at 719.

While both federal and state law enforcement agencies continually work to protect consumers, resources are limited. The *Amici* States necessarily rely on private litigants to supplement their efforts, particularly where, as here, substantial private interests are at stake.[58] To limit individual litigants' standing would undermine the FCRA's entire private enforcement scheme as well as recent congressional policy with regard to class actions. One of the explicit purposes of the Class Action Fairness Act of 2005 is to "restore the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction[.]" Pub. L. No. 109-2, 119 Stat. 4, § 2(b)(2). Yet, consumers barred from bringing federal actions on standing grounds will be limited to seeking redress (individually or collectively) in state court.

Additionally, the availability of private enforcement through class litigation serves as an important deterrent to statutory violations where individual damages are small or hard to separately quantify, as

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[58] *See, e.g., Holman v. Experian Info. Solutions, Inc. et al*, C.A. No. 11-00180, Dkt. No. 279, at pp. 4-5 & 7 (N.D. Cal. Dec. 29, 2014) (approving a class action settlement following Experian's willful violation of the FCRA by selling plaintiffs' credit information to a debt collector for impermissible purposes and finding the settlement amount of $375 to each class member who submitted a valid claim (1,317 of approximately 38,000 class members) "well within the range of potential statutory damages" provided by the FCRA, and that the payment of $2,250,000 in costs and attorneys' fees was also reasonable to ensure that the congressional policy embedded in the FCRA – "to redress[] [important] public interest claims" – "will be vindicated").

they often are in the FCRA context. *See Murray*, 434 F.3d at 953 ("Rule 23(b)(3) was designed for situations such as [the FCRA], in which the potential recovery is too slight to support individual suits, but injury is substantial in the aggregate."). That large financial awards are possible does not mean that class litigation is being abused.[59] "[S]ociety may gain from the deterrent effect of financial awards" of class litigation, which will prompt consumer reporting agencies to be appropriately cautious with sensitive personal data and to ensure its accuracy and security. *Murray*, 434 F.3d at 953. Even if the FCRA creates incentives for some aggressive plaintiffs or "testers" – who have long been "praised rather than vilified" in the housing and employment contexts – such collective actions vindicate important private rights and, ultimately, help correct abusive practices. *Id.* at 954.

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[59] Contrary to the impression created by Petitioner's and its *amici*'s invocation of potential uncontrolled class action abuse, the State Attorneys General, who are required to receive notice of all class action settlements (*see* 28 U.S.C. §§ 1715(b), (d)), actively monitor and evaluate them for abuse. *See, e.g., Figueroa v. Sharper Image Corp.*, 517 F. Supp. 2d 1292, 1328 (S.D. Fla. 2007) (stating that the "appearance of the Attorneys General of thirty-five states and the District of Columbia, representing hundreds of thousands, if not millions, of eligible class members," who "objected at every turn to each version of the parties' proposed coupon settlement" with "vigor and substance," "counsels against a finding favorable to the parties"); *Wilson v. DirectBuy, Inc.*, No. 3:09-CV-590JCH, 2011 WL 2050537, at *9 (D. Conn. May 16, 2011) (noting the brief of thirty-nine attorneys general "forcefully argu[ing] that the settlement is both overstated and undervalued" was "especially helpful and ... a placeholder for many absent class members' objections").

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the court of appeals.

Respectfully submitted,

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REPLY BRIEF

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No. 13-1339

In The

Supreme Court of the United States

SPOKEO, INC.,

Petitioner,

v.

THOMAS ROBINS,

Respondent.

On Writ of Certiorari to
the United States Court Of Appeals
for the Ninth Circuit

BRIEF FOR THE NATIONAL ASSOCIATION OF HOME BUILDERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether Congress may confer Article III standing upon a plaintiff who suffers no concrete harm, and who therefore could not otherwise invoke the jurisdiction of a federal court, by authorizing a private right of action based on a bare violation of a federal statute.

TABLE OF CONTENTS

Page(s)

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 2

I. CONGRESS MAY NOT ABROGATE A PLAINTIFF'S REQUIREMENT TO PROVE AN INJURY 2

A. This Court Has Interpreted the Constitution to Require an Injury-in-Fact, Causation and Redressability 2

B. Congress May Not Supersede Constitutional Interpretations 4

II. AT THE MOTION TO DISMISS STAGE, THE STANDING BAR IS LOW 5

A. Notice Pleading Under Federal Rule of Civil Procedure 8(a)(2) 5

B. Standing at the Pleading Stage 5

C. A Plaintiff's Injuries Need Not Be Significant 8

CONCLUSION 9

TABLE OF AUTHORITIES

Page(s)

Cases

American Soc. of Travel Agents, Inc. v. Blumenthal, 566 F.2d 145 (D.C. Cir. 1977) 6

Arizona Christian Sch. Tuition Org. v. Winn, 131 S. Ct. 1436 (2011) 3

Arizona State Leg. v. Arizona Indep. Redistricting Comm'n, No. 13-1314, 2015 WL 2473452 (June 29, 2015) 3

Baker v. Carr, 369 U.S. 186 (1962) 8

Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007) 5

Chevron Natural Gas v. F.E.R.C., 199 F. App'x 2 (D.C. Cir. 2006) 8-9

Danvers Motor Co., Inc. v. Ford Motor Co., 432 F.3d 286 (3d Cir. 2005) 8

Dickerson v. United States, 530 U.S. 428 (2000) 4

Erickson v. Pardus, 551 U.S. 89 (2007) 5

Harper v. Virginia State Bd. of Elections, 383 U.S. 663 (1966) 8

Hollingsworth v. Perry, 133 S. Ct. 2652 (2013)... 3, 4

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) 4, 7

TABLE OF AUTHORITIES *(cont.)*

Page*(s)*

Lujan v. Nat'l Wildlife Fed'n,
497 U.S. 871 (1990) 7

McGowan v. State of Maryland,
366 U.S. 420 (1961) 8

Miranda v. Arizona, 384 U.S. 436 (1966) 4

Raines v. Byrd, 521 U.S. 811 (1997) 3

Robins v. Spokeo, Inc., 742 F.3d 409
(9th Cir. 2014) 2

Sorowitz v. Hilton, 383 U.S. 363 (1966) 6

Swierkiewicz v. Sorema N. A.,
534 U.S. 506 (2002) 5-6

Warth v. Seldin, 442 U.S. 490 (1975) 7

U.S. v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669 (1973) 8

Constitutional and Statutory Provisions

U.S Const. art. III 2, 3

U.S Const. art. III, § 2 3

Fed. R.Civ. Proc. 8(a) 6

Fed. R.Civ. Proc. 8(a)(2) 5, 6

TABLE OF AUTHORITIES *(cont.)*

Page*(s)*

Other

Kenneth Culp Davis, *Standing: Taxpayers and Others*, 35 U.Chi.L.Rev. 601 (1968)..... 8

INTEREST OF *AMICUS CURIAE*[1]

The National Association of Home Builders (NAHB) is a Washington, D.C.-based trade association whose mission is to enhance the climate for housing and the building industry. Chief among NAHB's goals is providing and expanding opportunities for all people to have safe, decent, and affordable housing. Founded in 1942, NAHB is a federation of more than 700 state and local associations. About one-third of NAHB's approximately 140,000 members are home builders or remodelers, and constitute 80% of all homes constructed in the United States. NAHB is a vigilant advocate in the nation's courts. It frequently participates as a party litigant and *amicus curiae* to safeguard the constitutional and statutory rights and business interests of its members and those similarly situated.

As an advocate in federal court, NAHB is keenly aware of the requirements for proving Article III standing. NAHB agrees with the Petitioner that a plaintiff may not invoke the jurisdiction of a federal court unless that plaintiff suffers an injury. NAHB, however, also files this brief to request that the court not raise the bar on standing at the motion to dismiss stage of litigation.

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1 Letters of consent are included with this filing. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

NAHB agrees with Petitioner, Spokeo, Inc., that, because the Article III "injury-in-fact" requirement is Constitutional, Congress may not eradicate it. At this stage of litigation (motion to dismiss), however, the standing hurdle should not be difficult for plaintiffs to overcome.

ARGUMENT

While Congress may not eradicate Article III's "injury-in-fact" requirement, the courts should not readily dismiss a plaintiff's complaint at the pleading stage of litigation.

I. CONGRESS MAY NOT ABROGATE A PLAINTIFF'S REQUIREMENT TO PROVE AN INJURY.

A. This Court Has Interpreted the Constitution to Require an Injury- in-Fact, Causation and Redressability.

The Court of Appeals for the Ninth Circuit explained: "Robins's personal interests in the handling of his credit information are individualized rather than collective. Therefore, alleged violations of Robins's statutory rights are sufficient to satisfy the injury-in-fact requirement of Article III." *Robins v. Spokeo, Inc.*, 742 F.3d 409, 413-14 (9th Cir. 2014). Article III, however, limits the jurisdiction of the federal courts to hearing "Cases" or "Controversies." U.S Const. art. III, § 2. "For there to be such a case or controversy, it is not

enough that the party invoking the power of the court have a keen *interest* in the issue. That party must *also* have 'standing,' which requires, among other things, that it have suffered a concrete and particularized injury." *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2659 (2013) (emphasis added). Thus, as the Court clearly stated, a plaintiff must have an interest and an injury to invoke a federal court's jurisdiction.

Furthermore, the Court has consistently explained that standing emanates from Article III and is therefore a Constitutional requirement. *E.g. Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, No. 13-1314, 2015 WL 2473452, at *8 (U.S. June 29, 2015) (providing that "standing is '[o]ne element' of the Constitution's case-or-controversy limitation on federal judicial authority. ") (quoting *Raines v. Byrd*, 521 U.S. 811, 818, 117 S.Ct. 2312, 138 L.Ed.2d 849 (1997)); *Hollingsworth*, 133 S. Ct. at 2661 ("In other words, for a federal court to have authority *under* the Constitution to settle a dispute, the party before it must seek a remedy for a personal and tangible harm.") (emphasis added); *Arizona Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1439 (2011) (providing that plaintiffs "must show that they have standing *under* Article III of the Constitution.") (emphasis added). Furthermore, the Court has repeatedly stated that Article III requires a plaintiff to prove i) injury-in-fact, ii) causation, and iii) redressability before a federal court may assert jurisdiction. *E.g. Hollingsworth*, 133 S. Ct. at 2661; *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

Thus, this Court has consistently interpreted and applied the Constitution in a manner that requires plaintiffs to prove an injury-in-fact caused by the defendant that is redressable before they may invoke the power of the federal judiciary.

B. Congress May Not Supersede Constitutional Interpretations

Congress may only alter Article III's standing requirements with a Constitutional amendment. In *Dickerson v. United States*, the Court addressed whether the warnings given by police pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966), could be overruled by an act of Congress, 530 U.S. 428 (2000). The Court explained that its decision in *Miranda* was based on the Constitution and that the warnings are Constitutionally required. *Id.* at 438-41. Furthermore, the Court held that "Congress may not legislatively supersede [the Court's] decisions interpreting and applying the Constitution." *Id.* at. 437.

The same reasoning should apply in this case. As the three components of standing are Constitutional requirements, but for a Constitutional amendment, Congress cannot abolish them.

II. AT THE MOTION TO DISMISS STAGE, THE STANDING BAR IS LOW.

While NAHB agrees that Congress may not erase the Constitutional requirement of an "injury in fact," it cautions the Court not to inadvertently raise the standing bar at the motion to dismiss stage.

A. Notice Pleading Under Federal Rule of Civil Procedure 8(a)(2)

Federal Rule of Civil Procedure 8(a)(2) provides that a complaint need only include "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R.Civ. Proc. 8(a)(2). That statement must simply provide "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, (2007). Yet, "[s]pecific facts are not necessary; the statement need only give the defendant fair notice of what the ... claim is and the grounds upon which it rests." *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (quoting *Bell Atl. Corp.*, 550 U.S. at 555 (internal quotation marks omitted). As this Court has explained:

> This simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims.
> Other provisions of the Federal Rules of Civil Procedure are inextricably linked to Rule 8(a)'s simplified notice pleading standard. Rule 8(e)(1) states that "[n]o technical forms of pleading or

> motions are required," and Rule 8(f) provides that [a]ll pleadings shall be so construed as to do substantial justice.

Swierkiewicz v. Sorema N. A., 534 U.S. 506, 513-14 (2002) (internal quotation marks omitted). In a Complaint, a plaintiff need not "allege all of the facts supportive of the chain of causation upon which his allegation of injury rests" because that "would return [the courts] to the unpredictable and fact-laden system of code pleading." *American Society of Travel Agents, Inc. v. Blumenthal*, 566 F.2d 145, 156 (D.C. Cir. 1977) (Chief Judge Bazelton dissenting). The Federal Rules of Civil Procedure

> were designed in large part to get away from some of the old procedural booby traps which common-law pleaders could set to prevent unsophisticated litigants from ever having their day in court. If rules of procedure work as they should in a honest and fair judicial system, they not only permit, but should as nearly as possible guarantee that bona fide complaints be carried to an adjudication on the merits.

Sorowitz v. Hilton, 383 U.S. 363, 373 (1966).

B. Standing at the Pleading Stage

In conformance with Rule 8(a), to establish standing at the pleading stage a plaintiff need only provide general allegations of injury resulting from

the defendant's conduct. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). "For purposes of ruling on a motion to dismiss for want of standing, . courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *Warth v. Seldin*, 442 U.S. 490, 501 (1975). Additionally, at this stage, the courts "presume[] that general allegations embrace those specific facts that are necessary to support the claim. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 889 (1990).

Thus, in response to a motion to dismiss courts should fill in the gaps to find that standing exists. They should not conduct lengthy analyses to create reasons that it does not.

Assume, for example, that a business challenged a rule developed by a federal agency because it believed the agency i) failed to follow the proper procedures for promulgating the rule and ii) acted beyond its authority. In its Complaint, the business explained that it believed the rule would cause it to hire consultants to assist with compliance and alter the way it conducted its business. Certainly, faced with a motion to dismiss, a court could "fill in the gaps" by assuming that hiring consultants and changing business practices would cause the business to expend funds that it would not otherwise expend. And this would support the business's standing.

C. A Plaintiff's Injuries Need Not be Significant

Finally, this Court has previously explained that while an "interest" in a problem does not suffice as an injury, the harm incurred by a plaintiff need not be "significant." The Court has "allowed important interests to be vindicated by plaintiffs with no more at stake in the outcome of an action than a fraction of a vote, *see Baker v. Carr*, 369 U.S. 186 (1962); a $5 fine and costs, *see McGowan v. Maryland*, 366 U.S. 420 (1960); and a $1.50 poll tax, *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966)." *United States v. Students Challenging Regulatory Agency Procedures* (SCRAP), 412 U.S. 669, 690 (1973) (additional citations omitted). "'The basic idea that comes out in numerous cases is that an identifiable trifle is enough for standing to fight out a question of principle; the trifle is the basis for standing and the principle supplies the motivation.'" *Id.* (quoting Davis, *Standing: Taxpayers and Others*, 35 U.Chi.L.Rev. 601, 613 (1968).) In other words, "[i]njury-in-fact is not Mount Everest." *Danvers Motor Co. v. Ford Motor Co.*, 432 F.3d 286, 294 (3d Cir. 2005).

Again, assume that a plaintiff is challenging a rule created by a federal agency. If the plaintiff alleges that the rule will cause it to in any way, change how it conducts its operations, then it has stated an "identifiable trifle." This is enough to establish an "injury in fact." *See Chevron Natural Gas v. F.E.R.C.*, 199 F. App'x 2, 3-4 (D.C. Cir. 2006) (explaining that an "increase [in] daily monitoring

costs and . . . a loss in scheduling flexibility" satisfied the injury requirement).

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Thus, if courts properly consider, i) the simplified notice pleading requirements, ii) the favorable view that must be given to the plaintiff's allegations, and iii) the minuteness of the required injury, they should infrequently dismiss a plaintiff's case for lack of standing on the pleadings.

CONCLUSION

The Court has interpreted the Constitution to require only an "identifiable trifle" to satisfy Article III's injury in fact requirement. The Ninth Circuit's analysis, however, improperly allows a plaintiff to have standing based on no injury at all. Therefore, its decision should be reversed.

Respectfully Submitted,

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Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF NATIONAL ASSOCIATION OF PROFESSIONAL BACKGROUND SCREENERS; NATIONAL CONSUMER REPORTING ASSOCIATION; BACKGROUND SCREENING & SECURITY SOLUTIONS LLC; BACKTRACK, INC.; CHECKR, INC.; LOWERS RISK GROUP LLC; PEOPLETRAIL; AND PRECHECK AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Table of Contents i

Table of Authorities iii

Identity of the *Amici* 1

Summary of Argument 4

Argument 6

I. The Ninth Circuit Decision Violates Article III Standing Requirments 6

II. FCRA Cases Based on Technical Violations of the Statute Have Threatened the Viability of *Amici's* Members 8

A. Permitting these suits to proceed in the absence of harm skews the statute against small businesses 12

B. The Ninth Circuit rule compels *in terrorem* settlements 15

C. Government enforcement and the potential for competitor suits vindicates the public interest 19

III. The Fair Credit Reporting Act Requires the Defendant to Cause Harm to a Recognized Reputational or Economic Interest 20

A. The zone of interest protected by the Fair Credit Reporting Act is limited to a consumer's privacy interests in the fields of credit, insurance, and employment. 22

B. Respondent has failed to allege proximate cause to an interest covered by the statute 24

1. A plaintiff must allege harm to a privacy interest to have statutory standing under the FCRA 27

2. The complaint lacks a causal link to reputational harm 31

IV. Conclusion 35

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Cases

Ashcroft v. Iqbal, 556 U.S. 662 (2009) 16, 18, 32

Bateman v. Am. Multi-Cinema, Inc.,
623 F.3d 708 (9th Cir. 2010) 17

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579 F.3d 702 (6th Cir. 2009) 6

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550 U.S. 544 (2007) 16

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517 U.S. 559 (1996) 26

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133 S. Ct. 1138 (2013) 7

Doe v. Chao, 540 U.S. 614 (2004) 21, 22, 25, 26

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517 F.3d 1024 (8th Cir. 2008) 20

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472 U.S. 749 (1985) 28

Dura Pharm., Inc. v. Broudo,
544 U.S. 336 (2006) 16

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961 F. Supp. 2d 783 (D. Md. 2013) 9

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471 U.S. 539 (1985) 30

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742 F.3d 409 (9th Cir. 2014) 6

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551 U.S. 47 (2007) 9

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No. 3:14-cv-00494-SI (D. Or. Mar. 25,
2014)..... 15

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426 U.S. 26 (1976) 7

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2014 U.S. Dist. LEXIS 150748
(E.D. Cal. Oct. 22, 2014)..... 15

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122 S. Ct. 2386 (2002) 17

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for Separation of Church & State, Inc.*,
454 U.S. 464 (1982) 7

Constitutional Provisions and Statutes

U.S. Const. art. III .....*passim*

12 U.S.C. § 5564..... 19

15 U.S.C. § 1681 *et seq.*..... 6

15 U.S.C. § 1681(a)(1) 23

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15 U.S.C. § 1681(a)(3) 23

15 U.S.C. § 1681(a)(4) 23

15 U.S.C. § 1681(b)..... 17, 23

15 U.S.C. § 1681a(d)..... 23

15 U.S.C. § 1681a(d)(1) 9
15 U.S.C. § 1681a(f) 8
15 U.S.C. § 1681b 14, 24
15 U.S.C. § 1681b(a) 23
15 U.S.C. § 1681b(b)(2)(a) 15
15 U.S.C. § 1681e(a) 11, 14
15 U.S.C. § 1681e(b) 10
15 U.S.C. § 1681e(d) 14
15 U.S.C. § 1681e(d)(1)(A) 11
15 U.S.C. § 1681e(d)(1)(B) 11
15 U.S.C. § 1681g(c)(2) 14
15 U.S.C. § 1681h(e) 12
15 U.S.C. § 1681i 12
15 U.S.C. § 1681j(a)(1)(C) 34
15 U.S.C. § 1681k(a)(2) 11
15 U.S.C. § 1681n 25
15 U.S.C. § 1681n(a)(1)(A) 6
15 U.S.C. § 1681n(a)(2) 26
15 U.S.C. § 1681o(a) 12
15 U.S.C. § 1681s(a) 19
15 U.S.C. § 1681s(b) 19
15 U.S.C. § 1681s(c) 31
15 U.S.C. § 1681s(c)(1) 19
15 U.S.C. § 1681s(c)(2) 19

15 U.S.C. § 1681s-2(a)(1)(A) 12
15 U.S.C. § 1681s-2(c) 12
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17 U.S.C. § 107(4) 30
17 U.S.C. § 501 31
17 U.S.C. § 504(c) 30
35 U.S.C. § 292 31
35 U.S.C. § 292 (2010) 31
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102d Cong. (1991) (Serial No. 102-45) 29

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S. Rep. No. 91-517 (1969).....12, 24, 28, 29

IDENTITY OF THE *AMICI*[1]

Amici are companies or associations of companies that operate as "consumer reporting agencies" under the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq*. They provide pre-employment, tenant, and mortgage credit reports to employers, lenders, and landlords of all shapes and sizes.

The **National Association of Professional Background Screeners** (NAPBS) is an international trade association of nearly 750 large and small employment and tenant background screening firms that provides a unified voice in the development of national, state, and local regulation of background screening. Its members, all of whom are regulated by the FCRA, search publicly available criminal background information from domestic and international sources in order to enable employers and landlords to provide their customers with safe places to live and work. NAPBS's membership primarily consists of small and mid-size businesses.

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. In addition, no person or entity other than *amici* or their members made a monetary contribution intended to fund the preparation or submission of this brief. Evidence of the parties' consent to its filing has been lodged with the Clerk of this Court.

The **National Consumer Reporting Association** (NCRA) is a national trade organization of consumer reporting agencies and associated professionals that provide products and services to credit grantors, employers, landlords and all types of general businesses. NCRA's membership includes 70 percent of the mortgage credit reporting agencies in the United States that can produce a credit report meeting Fannie Mae, Freddie Mac and HUD requirements for mortgage lending.

Background Screening & Security Solutions LLC is a five-employee consumer reporting agency that provides pre-employment and volunteer screening to small & mid-sized companies and non-profit organizations. It also provides numerous educational programs on recommended screening policy and procedure development.

BackTrack, Inc is a nationwide consumer reporting agency who employs nearly 100 people. It checks and verifies criminal record, employment, education histories and other matters regarding their clients' prospective employees.

Checkr, Inc., www.checkr.com, is regulated by the Fair Credit Reporting Act, and provides employment screening to a variety of industries. Its Checkr U compliance education programs inform customers and consumers about their critical roles and responsibilities in the screening process.

Lowers Risk Group LLC (Lowers Risk Group), a rapidly growing mid-size consumer reporting agency, services organizations operating in high-risk, highly-regulated environments and organizations that value risk mitigation. More specifically, Lowers Risk Group companies Wholesale Screening Solutions and Proforma Screening Solutions are consumer reporting agencies as defined by the federal Fair Credit Reporting Act (FCRA). Wholesale Screening Solutions provides wholesale public record court and law enforcement data, and verification services to other consumer reporting agencies. Proforma Screening Solutions provides consumer reports in the form of background check services to end users.

Peopletrail is a fifty-employee company whose activities are regulated by the Fair Credit Reporting Act. It integrates customer service and technology to deliver on-demand, accurate and timely consumer reporting results to government, small business, and Fortune 500 clients.

PreCheck is an industry-accredited, national background screening company that focuses on the needs of healthcare employers. In accordance with the Fair Credit Reporting Act, PreCheck performs pre-employment screening of doctors, nurses, hospital staff, and healthcare workers involved in providing patient care at all levels.

SUMMARY OF ARGUMENT

Amici and their members consist primarily of small and midsize consumer reporting agencies that conduct background screening for employment, housing, and mortgage lending. They provide the information necessary to create safe places to live and work. *Amici* agree with petitioner that the facts in this case fail to state a justiciable "case or controversy," and that Article III standing requires more than a bare statutory violation.

The Ninth Circuit created federal court jurisdiction based solely on a technical violation of the Fair Credit Reporting Act ("FCRA"). When this Court clarified pleading standards under the Federal Rules of Civil Procedure, it remarked on the prospect of unfair *in terrorem* settlements and an unwieldy discovery process as reasons for trial courts to ensure that the specific facts pled in a complaint support the claimed wrong. *Amici* submit that the same unfairness occurs through class-action suits that lack allegations of concrete harm, and is exacerbated by the presence of a statutory damage multiplier. *Amici*'s members face a practical reality in which ruinous potential liability and litigation expense grossly outweighs any particularized injury actually experienced by consumers. Additionally, *amici's* members are seeing an increase in the number of class action and individual claims in which the plaintiffs have suffered no injury whatsoever. That exposure and expense is not limited to large consumer reporting agencies: it has spread to small and mid-size businesses.

The lower court's Article III analysis omitted an important predicate question, namely whether the FCRA even purports to grant standing to sue individuals who have not suffered harm. Ordinarily, statutes are not presumed to reach the outer bounds of Article III standing without express Congressional direction. Instead, courts should determine standing based on two well-known common law doctrines: the zone-of-interests test, and proximate causation.

Respondent's claims fall well outside the statutory standing that the FCRA creates. Applying the zone of interests test to the text of the FCRA reveals that Congress was only concerned with a consumer's privacy as it pertains to the fields specified in the statute: employment, credit and insurance. Here, respondent has alleged harm to his privacy interests as applied to employment, but facts showing proximate cause are absent. None of the petitioner's alleged inaccuracies directly harmed the respondent's privacy interests in the field of employment (or anywhere else).

ARGUMENT

I. THE NINTH CIRCUIT DECISION VIOLATES ARTICLE III STANDING REQUIRMENTS

Section 616 of the Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681 *et seq.*, provides that any person who "willfully" fails to abide by any of its requirements with "respect to any consumer" shall be liable to that consumer for "any actual damages or damages of not less than $100 and not more than $1000." 15 U.S.C. § 1681n(a)(1)(A). The Ninth Circuit found that the naked allegation of a "willful" FCRA violation gives a plaintiff Article III standing to bring a case. *Robins v. Spokeo, Inc.*, 742 F.3d 409, 414 (9th Cir. 2014). Relying on the Sixth Circuit's analysis in *Beaudry v. TeleCheck Servs., Inc.*, 579 F.3d 702, 707 (6th Cir. 2009), the lower court used a two-part test to address Article III standing. First, the plaintiff "must be among the injured, in the sense that she alleges the defendants violated *her* statutory rights." *Robins*, 742 F.3d at 413 (citation omitted). In addition, "the statutory right at issue must protect against individual, rather than collective, harm." *Id.* (citation and quotation omitted). Applying this test, the lower court concluded that the alleged violations of respondent's statutory rights conferred federal jurisdiction. *Id.* at 413-14. The Ninth Circuit erred.

Article III requires the plaintiff to have suffered "an injury in fact—an invasion of a legally protected interest which is (a) concrete or particularized, and (b) actual or imminent, not

conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (internal quotation marks, citations, and footnote omitted); *see also Clapper v. Amnesty Int'l*, 133 S. Ct. 1138, 1147 (2013). In addition, the plaintiff must show a "causal connection between the injury and the conduct complained of" that is "fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." *Lujan*, 504 U.S. at 560 (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976)). Because standing allegations are "not mere pleading requirements, but rather an indispensible part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof." *Lujan*, 504 U.S. at 561.

Although Congress has broad power to create private causes of action by statute, "[I]t is settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing." *Raines v. Byrd*, 521 U.S. 811, 820 n.3 (1997); *see also Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 487 n.24 (1982) ("Neither the Administrative Procedure Act, nor any other congressional enactment, can lower the threshold requirements of standing under Art. III.").

In this case, the Ninth Circuit confused the violation of a statutory protection with the concrete harm required by Article III: the mere fact that a statute may "protect against harm" does not mean

that justiciable injury has occurred. *See Lujan,* 504 U.S. at 580 (Kennedy, J., concurring). *Amici* agree with petitioner that Article III standing does not exist in this case because the Ninth Circuit's approach collapses a three-part injury test into one factor. (Pet. Br. at 36-39.) The Ninth Circuit analysis suffers from another defect, however, in that it failed to determine whether the statute gave Mr. Robins a cause of action in the first place. Their extensive compliance efforts notwithstanding, the Ninth Circuit's rule has improperly forced *amici*'s members to live under a sword of Damocles forged from one part harm-free suits, and one part statutory damage multiplier.

II. FCRA CASES BASED ON TECHNICAL VIOLATIONS OF THE STATUTE HAVE THREATENED THE VIABILITY OF *AMICI'S* MEMBERS

Amici's members are in the business of information. In the language of the statute, *amici's* members are "consumer reporting agencies"[2] (CRAs) that are in the business of assembling and furnishing "consumer reports."[3] Their efforts help

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[2] 15 U.S.C. 1681a(f) (defining "consumer reporting agencies' as any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties").

[3] The statute defines a consumer report as "any communication of any information by a consumer reporting

an employer or housing provider "ensure the security of its facilities" and employ "a competent, reliable workforce." *NASA v. Nelson*, 562 U.S. 134, 150 (2011); *see also EEOC v. Freeman*, 961 F. Supp. 2d 783, 785 (D. Md. 2013) (noting that "[C]onducting a ... background check on a potential employee is a rational and legitimate component of a reasonable hiring process.").

Amici's members primarily operate in three fields: (1) pre-employment criminal background screening; (2) tenant screening; and (3) credit screening for residential mortgages. Although *amici* have a few larger members, the overwhelming majority are small and mid-size businesses. A substantial part of the *amici's* purpose is to educate its members on FCRA compliance, despite the "less-than-pellucid statutory text" of many provisions. *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 70 (2007). For example, *amicus* NAPBS offers individual certification programs and accredits companies that comply with its accreditation program's high standards of operation.[4] Similarly, *amicus* NCRA

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agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living" that is used or expected to be used for certain statutorily prescribed purposes, most notably credit, insurance, and employment, 15 U.S.C. § 1681a(d)(1).

[4] Background Screening Credentialing Council, *Background Screening Agency Accreditation Program Policies and Procedures* 9-11 (2009), *available at* http://www.napbs.com/accreditation/Policies_and_Procedures.p

provides courses not only to users of consumer reports, but also to CRAs in a variety of fields.[5] Both *amici* also devote substantial efforts to educating their members on recent FCRA activity by inviting practicing lawyers to advise their members on the latest FCRA developments and inviting regulators to advise *amici's* members about their views of sound industry practice.[6] *Amici's* members spend millions of dollars on FCRA compliance every year, which is also marketed as a reason for employers, landlords and others to use their services.

The statute places certain legal obligations on *amici*'s members. When an employer, lender or housing provider requests applicant screening, *amici*'s CRA members have to honor several FCRA obligations that apply to the consumer information that they assemble. With respect to the consumer reports they furnish, they must "follow reasonable procedures to assure maximum possible accuracy," 15 U.S.C. § 1681e(b). Special care is taken with

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df (last visited June 23, 2015); *see also generally About NAPBS' Accreditation Program*, Nat'l Assoc. of Professional Background Screeners, http://www.napbs.com/accreditation (describing the certification program).

[5] *Education & Training Opportunities*, Nat'l Consumer Reporting Assoc., http://www.ncrainc.org/education-training-opportunities.html (last visited July 8, 2015).

[6] *See, e.g., Program Information: Schedule of Events*, Nat'l Assoc. of Prof'l Background Screeners, https://www.napbs.com/events/midyear2015/program/schedule.cfm (last visited July 8, 2015).

screening for employment: when reporting public record information (e.g., criminal information), CRAs must maintain "strict procedures" ensuring that such information is complete and up to date, or notify the consumer when that information is being reported. 15 U.S.C. § 1681k(a)(2). When *amici's* members provide a consumer report, they must provide the report's user with a statutorily prescribed notice detailing the user's obligations.[7] 15 U.S.C. § 1681e(d)(1)(B). Moreover, they must obtain certifications from the user that the report will be used only for a permissible purpose. 15 U.S.C. § 1681e(a).

The statute recognizes that mistakes can occur in the consumer reporting process and takes that possibility into account. The statute only provides private causes of action for negligent or willful violations, not all violations.[8] It also

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[7] A similar notice must be sent to "furnishers" of information (such as a department store who reports a delinquent account) that describes that furnisher's obligations. 15 U.S.C. § 1681e(d)(1)(A).

[8] *See* 15 U.S.C. § 1681o(a) (indicating that private causes of action exist for negligent violations). *See also* 16 C.F.R. § 607(b)(3)(A) (noting that when a CRA receives information "from a source that it reasonably believes to be reputable and which is credible on its face, the agency does not violate this section simply by reporting an item of information that turns out to be inaccurate"); *Lazarre v. JPMorgan Chase Bank, N.A.*, 780 F. Supp. 2d 1320, 1328 (S.D. Fla. 2011) ("[t]he FCRA does not make consumer reporting agencies strictly liable for all inaccuracies in the reports they prepare.").

preempts most state causes of action for defamation against CRAs and others based on erroneous information in a consumer report, and requires a minimum of negligence before any private civil action can be filed. 15 U.S.C. §§ 1681h(e) & 1681o(a). Moreover, section 611, entitled "Procedure in case of disputed accuracy," creates a duty to investigate disputed information, and an opportunity to cure inaccuracies. 15 U.S.C. § 1681i. Similarly, furnishers of information (i.e., a department store) are only liable in private suits if they have cause to believe that the information they provide is false, or when they fail to conduct a reasonable reinvestigation of a claimed error. 15 U.S.C. §§ 1681s-2(a)(1)(A), 1681s-2(c).

A. Permitting these suits to proceed in the absence of harm skews the statute against small businesses

Read as a whole, the statute creates a balance between the accuracy and the availability of consumer reports. On one hand, it creates a number of obligations on both the users of consumer reports and those who furnish information for them to protect consumers' personal reputations. On the other hand, recognizing "the vital role played by credit reporting agencies in our economy," S. Rep. No. 91-517, at 1 (1969), it limits the exposure of CRAs for individual mistakes if the FCRA's reasonable procedures are followed. That balance is now skewed against CRAs by the threat of annihilating liability for technical violations.

The standing doctrine as espoused by the Ninth Circuit has rendered the FCRA a target-rich environment for enterprising plaintiffs' attorneys: even the small chance of being found liable for substantial multi-million-dollar awards creates enormous incentives to settle litigation no matter how tenuous the plaintiff's claim.[9] The class action bar has taken note: according to this Court's own reports, filings of cases involving consumer credit statutes, including the FCRA, increased by 53 percent in 2009.[10] Six years later, *amici*'s members are finding that where once only the large firms were targeted, smaller firms now appear in the crosshairs on truly questionable grounds. Many cases have been filed in instances where the harm suffered by the consumer consists solely of a violation of the statute.

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[9] *See generally* Sheila Scheuerman, *Due Process Forgotten: The Problem of Statutory Damages and Class Actions*, 74 Mo. L. Rev. 103, 104-06 (2009), *available at* http://scholarship.law.missouri.edu/cgi/viewcontent.cgi?article=3812&context=mlr (discussing the ruinous potential of the $100 to $1000 statutory damages under the Fair and Accurate Credit Transactions Act); David L. Permut & Tamra T. Moore, *Recent Developments in Class Actions: The Fair Credit Reporting Act*, 61 Bus. L. 931 (2006) (discussing FCRA damages in a class action context).

[10] 2009 Year-End Report on the Federal Judiciary, at 3, http://www.supremecourt.gov/publicinfo/year-end/2009year-endreport.pdf

For example, section 609 of the FCRA states that "a consumer reporting agency shall provide to a consumer" a series of written disclosures. 15 U.S.C. § 1681g(c)(2). *Amici* face a class action based on an alleged failure to provide statutory notices under that provision, *even though the defendant had no information on the plaintiff and never ran a consumer report on him.*[11] In another case, a class plaintiff was able to avoid any actual harm before filing the complaint.[12]

Sections 604 and 607 of the FCRA require CRAs to notify users of reports (i.e., employers and lenders) of their responsibilities under the Act, and to obtain certifications from employers that the reports will only be used for a permissible purpose. 15 U.S.C. §§ 1681e(a), (d), & 1681b. A CRA faced a consumer class action because it did not adequately obtain certifications from *employers* that the consumer report would be used for employment purposes, even though that was the *only* purpose for

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[11] Class Complaint ¶¶ 28-33, *Henderson v. InfoMart, Inc.*, No. 3:13-cv-00578 (E.D. Va. Aug. 26, 2013) (alleging violation of 15 U.S.C. § 1681g(c)(2); *see also* Class Complaint ¶¶ 24-30, *Henderson v. First Advantage Background Servs. Corp.*, No. 3:14-cv-00221 (E.D. Va. Mar. 24, 2014) (alleging violation of FCRA based on inaccurate information the plaintiff "believed" that the CRA had in his file).

[12] Another class representative in *InfoMart*, Mr. Woods, based his claim on the fact that he had a dispute with the CRA; the CRA fixed the erroneous information, and he was permitted to go on a field trip with his daughter. Class Complaint, *InfoMart*, *supra* note 11, at ¶¶ 51-56.

which the class plaintiff's report was used.[13] Still another CRA faced a class action employer certification complaint even though the plaintiff was completely ineligible for employment due to an accurately reported criminal conviction.14 Some courts are treating these minor issues the same as if the CRA totally failed to follow the FCRA thus demanding a minimum of $100 per consumer affected. *E.g., Syed v. M-I LLC*, 2014 U.S. Dist. LEXIS 150748, at 10-15 (E.D. Cal. Oct. 22, 2014); *Milbourne v. JRK Residential Am., LLC*, 2015 U.S. Dist. LEXIS 29905, at 19-20 (E.D. Va. Mar. 10, 2015); *Lengel v. HomeAdvisor, Inc.*, 2015 U.S. Dist. LEXIS 59017, at *1-*2 (D. Kan. May 5, 2015) (creating question of fact in the absence of actual damage).

B. The Ninth Circuit rule compels *in terrorem* settlements.

These fillings are not unique and demonstrate a serious and growing problem for CRAs. Plaintiffs who have never had a report generated on them, who were able to correct inaccurate reports before suffering any harm, who had their reports correctly

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[13] Class Action Complaint, ¶¶ 3, 21-26, *Lozano-Rivera v. Universal City Nissan*, No. 2:14-cv-01010 (C.D. Cal. Feb. 10, 2014) (alleging violations of 15 U.S.C. § 1681b(b)(2)(a)).

[14] *See* Class Action Complaint, ¶¶ 42-60, *Henderson v. Wal-Mart*, No. 3:14-cv-208 (E.D. Va. Mar. 24, 2014). *See also Scott v. KKW Trucking*, No. 3:14-cv-00494-SI (D. Or. Mar. 25, 2014) ¶¶7-15.

used for lawful purposes, or whose accurately assembled history rendered them ineligible for hire are being used to turn a supposedly reasonable regime of regulation into one of draconian liability.

Amici's smaller and midsize members simply cannot afford to fight these lawsuits. In *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662, 684 (2009), this Court clarified pleading requirements under rule 12(b)(6) of the Federal Rules of Civil Procedure to prevent discovery abuse and conserve judicial resources. *See Twombly*, 550 U.S. at 559 ("the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings"); *see also Iqbal*, 556 U.S. at 684 (clarifying that *Twombly*'s concerns over unruly discovery and *in terrorem* settlements are not limited to antitrust suits). By permitting FCRA cases to go forward based only on an unadorned statement of a statutory violation, the Ninth Circuit rule opens *amici's* members to *in terrorem* settlement of these claims as a "partial downside insurance policy." *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 347-48 (2006); *see also Twombly*, 550 U.S. at 557-58.

The prospects of statutory damages only compound these massive discovery costs. To make matters more daunting for defendants, there are no early procedural devices to challenge the appropriateness of an award. In a class action alleging that receipts improperly contained the expiration date of the plaintiff's credit card, the United States persuaded the trial court not to

examine the constitutionality of an award until *after* certification and willfulness had been proved. *See Bateman v. Am. Multi-Cinema, Inc.*, 623 F.3d 708, 723 (9th Cir. 2010); *Hepokoski v. Brickwall of Chi.*, LLC, 2009 U.S. Dist. LEXIS 122389 at *10-11 (N.D. Ill. Sept. 22, 2009).

As a result, the calculation on whether to settle a technical violation suit is performed *in terrorem*. A typical midsize background screening company might run one million checks per year, creating consumer reports "with respect to" five million total consumers in five years. A small, five-employee screening company might run about 5,000 consumer reports per year, and retain records on 25,000 total consumers over the same five-year time period as the midsize company. The midsize company stares down the barrel of a $ 5 billion maximum liability. Its *minimum* liability of $500 million is still well outside its revenue or even net worth. The smaller company faces an equally devastating $2.5 million liability on the low end, and $25 million on the high end. *Cf. Trans Union LLC v. FTC*, 122 S. Ct. 2386, 2387 (2002) (Kennedy, J., dissenting from denial of certiorari) (describing FCRA liability as "crushing").

That reality has turned what is supposed to be a "reasonable," 15 U.S.C. § 1681(b) system of consumer reporting on its head. Claimed statutory damages far exceed the net worth—or indeed the total assets—of most of *amici's* members. The liability that *amici's* members face under "bare allegation" FCRA suits therefore renders their defense choices fairly simple. They may either settle

the case based on creation of a class that has never been directly harmed by their activity, and be done with the liability, or they can litigate these marginal claims, endure a discovery process involving potentially millions of consumers--a process that the courts have acknowledged can barely be controlled, *see Iqbal*, 556 U.S. at 684-85, and risk liability that bankrupts the company. The choice to settle is not a hard one.[15] As the cost of the industry's insurance policies rise, *amici* are concerned that only the largest employers and CRAs will be financially able to afford the risk of fighting these suits.

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[15] *Amici's* members have seen steady increases in their insurance premiums as these cases become more prolific from year to year, and some insurers have ceased offering FCRA coverage altogether. *See* Jonathan Schwartz & Colin Wilmott, *EPLI Carriers Beware the Rising Tide of Background Check Actions*, Inside Couns. Magazine, June 11, 2015, *available at* http://www.insidecounsel.com/2015/06/11/epli-carriers-beware-the-rising-tide-of-fcra-backg (noting that " violation of law" exclusions from general liability coverage "specifically applies to (and was designed to eliminate) FCRA liability"). Justin F. Lavella & John W. McGuiness, *Insurance Coverage in Consumer Class Actions*, Corp. Couns. (Oct. 2010), at 7, 8 (noting that insurers had excluded FCRA and related claims from a variety of different policies). As the cost of the industry's insurance policies rise, *amici* are concerned that only the largest employers and CRAs will be financially able to afford the risk.

C. Government enforcement and the potential for competitor suits vindicates the public interest

To be clear, the conduct that Petitioner is alleged to have engaged in will receive no praise from *amici*. If proven, the allegations in the First Amended Complaint establish a business operating in willful disregard of the FCRA's dictates, and one that attempted to siphon customers from *amici* and their members without undertaking *any* of their extensive compliance costs. But Petitioner hardly got away with it: *amici* note that Petitioner was investigated by and settled with the Federal Trade Commission over the very same activity alleged in the complaint.[16] In the absence of concrete, particularized injury, that investigation and settlement vindicated the public interest in petitioner's FCRA compliance. *See, e.g.*, 15 U.S.C. §§ 1681s(a), (b), (c)(1), & (c)(2) (providing enforcement authority to Federal Trade Commission, multiple agencies, and state attorneys general); 12 U.S.C. § 5564 (describing CFPB litigation authority). In addition, Spokeo's alleged bad acts may expose it to federal and state liability from competitors on a

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[16] *See* Press Release, FTC, *Spokeo to Pay $800,000 to Settle FTC Charges Company Allegedly Marketed Information to Employers and Recruiters in Violation of FCRA* (June 12, 2012), *available at* http://www.ftc.gov/news-events/press-releases/2012/06/spokeo-pay-800000-settle-ftc-charges-company-allegedly-marketed. Prior to July 21, 2011 the Federal Trade Commission was the primary agency charged with FCRA enforcement.

theory of unfair competition. *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014). And, to the extent any consumer actually *was* hurt by Petitioner's transmission of inaccurate information (e.g., losing a job for which she was otherwise qualified), *amici* do not contest that the consumer and all others similarly situated would have suffered an injury-in-fact, have standing to sue, and should be fairly compensated for their injuries.

In that kind of case, the FCRA's statutory damage provisions create a range from which damages can be awarded in cases where harm cannot be accurately quantified. *See Dowell v. Wells Fargo Bank, NA*, 517 F.3d 1024, 1026 (8th Cir. 2008) (per curiam) (noting that a reasonable reading of the statute could require that plaintiff show some actual damage in order to make statutory damages available). Actual injury, however, is missing not only from this case, but every case in which *amici*'s members face suits based on nothing more than a technical statutory violation. The question becomes whether Congress intended that injury to be absent.

III. THE FAIR CREDIT REPORTING ACT REQUIRES THE DEFENDANT TO CAUSE HARM TO A RECOGNIZED REPUTATIONAL OR ECONOMIC INTEREST

In determining whether Congress intended to grant standing to plaintiffs covered by a cause of action, this Court unanimously instructed that the judiciary should not automatically assume the "unlikelihood that Congress meant to allow all

factually injured plaintiffs to recover." *Holmes v SIPC*, 503 U.S. 258, 266 (1992) (cited in *Lexmark*, 134 S. Ct. at 1388. Congress "must at the very least identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit." *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring). Moreover, "statutory causes of action are regularly interpreted to incorporate standard common-law limitations on civil liability—the zone-of-interests test no less than the requirement of proximate causation." *Lexmark*, 134 S. Ct. at 1389 n.5. *See also* John Roberts, *Article III Limits on Statutory Standing*, 42 Duke L.J. 1219, 1227 (1993).

Here, although Congress identified consumers as the class of persons entitled to bring suit, they failed to relate the injury protected by the statute to that class of persons. The Ninth Circuit misconstrued the phrase "with respect to any consumer," and as a result "treats willful action as the last fact necessary" to make a private cause of action accrue. *Doe v. Chao*, 540 U.S. 614, 620 (2004). As was the case in *Lexmark*, broad language alone does not and should not convey an intent to reach or exceed the bounds of Article III. *See Lexmark*, 134 S. Ct. at 1388. Before addressing those bounds, the lower court should have looked to the zone-of-interests protected by the statute, and whether the statutory violation proximately caused harm to those interests. *See id.*

Application of that traditional common-law analysis reveals two things. First, the "zone of interests" protected by the statute encompasses a consumer's privacy interests in the areas of

insurance, employment and credit, not every imaginable reputational harm or inaccuracy. Second, the defendant's act must proximately cause injury to those interests, which is where respondent's case fails.

A. The zone of interest protected by the Fair Credit Reporting Act is limited to a consumer's privacy interests in the fields of credit, insurance, and employment.

As an initial matter, Congress is "presumed to "legislat[e] against the background of" the zone-of-interests limitation, "which applies unless it is expressly negated." *Bennett v. Spear*, 520 U.S. 154, 163 (1997) (cited in *Lexmark*, 134 S. Ct. at 1388). In the absence of Congressional instruction, construction of the statute should begin "with the traditional understanding that tort recovery requires not only wrongful act plus causation reaching to the plaintiff, but proof of *some harm* for which damages can reasonably be assessed." *Doe*, 540 U.S. at 621 (citing W. Keeton et al., Prosser and Keeton on Law of Torts §30 (5th ed. 1984)) (emphasis supplied). Absent an express statement by Congress that it intended to stretch the bounds of Article III, the proper way to resolve the zone of interests inquiry is by examining the text of the statute. *Lexmark,* 134 S. Ct. at 1388.

When it enacted the FCRA, Congress made several express statutory findings. It acknowledged the dependence of the banking system on "fair and accurate" credit reporting, and acknowledged that an

"elaborate mechanism" exists for investigating consumers' character, creditworthiness and "general reputation." 15 U.S.C. §§ 1681(a)(1), (2). It also found that CRAs have assumed a "vital role" in assembling and evaluating consumer information, and that a need existed to ensure CRAs carried out their "grave responsibilities" with "fairness, impartiality, and a respect for the consumer's right to privacy." 15 U.S.C. § 1681(a)(3), (4). Based on these findings, Congress defined the purpose of the Fair Credit Reporting Act as follows:

> It is the purpose of this title to require that consumer reporting agencies adopt *reasonable* procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information in accordance with the requirements of this subchapter."

15 U.S.C. § 1681(b) (emphasis supplied).

Structurally, the FCRA regulates the accuracy of "consumer reports," which exist only if assembled by a CRA and used or expected to be used primarily for three specific purposes relevant to this case: employment, insurance, or credit. 15 U.S.C. § 1681a(d) (defining consumer report); 15 U.S.C. § 1681b(a) (limiting consumer report use). It also places further limits on so-called "investigative consumer reports," which are used for the same

purposes but involve interviews with neighbors, co-workers, and others and are typically more thorough than an ordinary consumer report.[17] These provisions reveal a Congressional concern with a consumer's reputation and privacy, but one tailored to specific areas where the consumer suffers specific injury in expressly defined contexts.

Respondent's common-law privacy interests are therefore fairly placed within the zone of interests protected by the FCRA, namely, protection of his reputation in one or more fields that the statute expressly regulates: insurance, credit or employment. He has alleged that harm to those interests has occurred. (First Amd. Compl. ¶¶ 34-37.) The next question turns on whether respondent has sufficiently alleged that the violation of the statute was the proximate cause of an injury to those interests. He has not.

B. Respondent has failed to allege proximate cause to an interest covered by the statute

There is no indication that Congress intended to dispose of the common-law concept of privacy or its requirement of proximate cause. Unlike the Lanham Act provision construed in *Lexmark*, which provided a cause of action to anyone who "believed"

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[17] *See* 15 U.S.C. § 1681b; *see also generally* S. Rep. No. 91-517, at 4 (1969) (expressing concerns over scope of investigative consumer reports).

they were harmed, the FCRA is narrower. In cases involving a willful violation, the text of the statute entitles a consumer to "actual damages" or "damages" within a statutory range. *See* 15 U.S.C. § 1681n. *Amici* note that "when the statute gets to the point of guaranteeing the [statutory] minimum, it not only has confined any eligibility to victims of adverse effects caused by intentional or willful actions, but has provided expressly for liability to such victims for "actual damages."" *Doe*, 540 U.S. at 619. That language should be "interpreted as designed to protect the class of persons in which the plaintiff is included, against the risk of the type of harm *which has in fact occurred* as a result of its violation." *Lexmark*, 134 S. Ct. at 1389 n.5. (citing W. Keeton, *supra* § 36, 229-30); *see also Doe*, 540 U.S. at 621 (noting that tort law requires some harm before damages are presumed). In other words, the word "damage" used in this context incorporates a requirement that the violation proximately caused harm within the zone of interests.

Changes to the statutory text confirm its common-law background. As initially introduced and passed in the Senate,[18] the FCRA allowed the

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[18] The text of S. 823 was added to S. 3678 (Foreign Bank Secrecy and Bank Recordkeeping), which replaced H.R. 15073 as an amendment in the nature of a substitute offered on the floor of the Senate. 116 Cong. Rec. 32,639 & 32,644 (1970). The resulting Act was sent to conference where it was amended, reported, and passed both chambers without further amendment. *Compare* H.R. Rep. No. 91-1587, at 15-24 (1970) (Conf. Rep.) (containing the conference approved amendments

consumer to recover "an amount equal to the sum of – (1) any actual damages sustained ; (2) such amount of punitive damages, which shall not be less than $100 nor greater than $1,000; *and* (3) . costs together with reasonable attorney's fees " for willful violations.[19] The floor and ceiling amounts for punitive damages were removed through a House amendment during the conference process.[20]

In 1996, Congress introduced a statutory damage calculation range, creating the current version of the law.[21] Punitive damages remain uncapped by statute.[22] *Amici* suggest the reason Congress inserted this range was, as was common in reputational torts, actual damages can be hard to prove. For that reason, Congress added language to allow presumed damages to be recovered from a predefined range. *Cf. Doe*, 540 U.S. at 621-22 (the word "damage" does not automatically imply that general damages are available in privacy statute). It does not follow—at all—that Congress meant to

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to the Consumer Credit Protection Act) *with* Fair Credit Reporting Act, Pub. L. No. 91-508, Title VI, 84 Stat. 1114, 1127 (1970) (text of amendments as enacted).

19 S. 823, 91st Cong. § 616 (1969).

20 H.R. Rep. No. 91-1587, at 30 (1970) (Conf. Rep.).

21 Consumer Credit Reporting Reform Act of 1996, Pub. L. No. 104-208, § 2412, 110 Stat. 3009, 3009-446 (1996).

22 15 U.S.C. § 1681n(a)(2). *But see BMW of N. Am. Inc. v. Gore*, 517 U.S. 559 (1996) (stating "exemplary damages must bear a "reasonable relationship" to compensatory damages")

depart from the common-law standards of the privacy tort, which require proof of causation and harm before establishing damages. Congress only intended to provide an alternate means of calculating damages after causation of injury had been demonstrated.

1. A plaintiff must allege harm to a privacy interest to have statutory standing under the FCRA

The common law long recognized a personal right in one's reputation, protected by causes of action for invasion of privacy and defamation. *See* Restatement of Torts §§ 867, 559 (1938). By the time of the FCRA's drafting, courts had recognized the legal concept of privacy as not only containing defamation, but also several other overlapping causes of action, most notably "intrusion on seclusion," "false light," and "publicity given to private facts."[23] That right, however, was a "personal one, which does not extend to the members of [a plaintiff's] family." William L. Prosser, *Privacy*,

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[23] *Privacy*, *supra* at 389; *see also, e.g.*, William L. Prosser, Torts § 112 at 832 (and cases cited therein) (3d ed. 1964). Dean Prosser's framework was adopted in the Restatement (2d) of Torts. *See* Restatement (Second) of Torts §§ 652A (defining privacy tort generally), 652D (stating that the tort of publication of private facts exists if "the matter publicized is of a kind that would be highly offensive to a reasonable person, and is not of legitimate concern to the public") § 652B (intrusion on seclusion), & 652E (false light) .

48 Cal. L. Rev. 383, 408 (1960). Plaintiffs personally harmed in privacy cases also could recover damages for "emotional distress or personal humiliation that he proves to have been actually suffered", if "normal" and "reasonable in its extent." Restatement (Second) of Torts § 652H, comment b. Each of these torts requires the plaintiff's acts to be the proximate cause of some reputational harm—either through the publication of private facts in an offensive manner, or through the false imputation of some harm caused by the words' offensive nature, such as a refusal to do business with someone. *See* Restatement of Torts §§ 559, 867 comment d. (1938); *Dun and Bradstreet v. Greenmoss Builders*, 472 U.S. 749, 761 (1985) (allowing for recovery of presumed damages in defamation cases involving matters of private concern irrespective of fault).

The kinds of actionable personalized harm traditionally suffered by plaintiffs in privacy cases formed the reason for the statute's enactment. In enacting the FCRA, Congress was concerned that consumers applying for "credit, insurance, or employment *should not be denied* these essentials because of erroneous, incomplete, obsolete, misleading or malicious information." *Fair Credit Reporting: Hearings on H.R. 16340 Before the Subcomm. on Consumer Affairs of the H. Comm. on Banking and Currency*, 91st Cong. at 1 (1970) (emphasis supplied). It sought to "ensure the free flow of credit information" while at the same time ensuring consumer access to the consumer's credit file "so that he is not unjustly damaged by an erroneous credit report." S. Rep. 91-517, at 2 (1969).

The harm to individual consumers that Congress sought to remedy fits well within traditional common-law bounds. First, a consumer could not discover when a consumer report damaged them, as users were contractually bound not to disclose those reports. S. Rep. 91-517, at 3. Second, assuming that she learned of a harmful error, the consumer had difficulty correcting inaccurate information. *Id.* Third, the consumer's personal reputations were subject to the vagaries of invasive, unregulated and unreliable investigative consumer reports that reached into intimate details of their domestic and social life, and Congress found it too easy to get access to consumer reports of any kind. *Id.* at 4. Finally, Congress noted that some agencies had difficulty keeping public records current, for example by reporting a lawsuit, but not reporting that it had been dismissed, or by keeping credit difficulties in the consumer's file forever—long after they ceased to be relevant. *Id.* Put another way, at the time of the FCRA's enactment, Congress sought to provide a federal remedy for activity that harmed consumers' reputations under false light, public fact, and defamation theories.[24]

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[24] Before adding the statutory damage range, the testimony Congress received uniformly involved statements from consumers who had suffered actual harm beyond a mere statutory violation. *See, e.g., Fair Credit Reporting Act: Hearing before the Subcomm. on Consumer Affairs and Coinage of the H. Comm. on Banking, Finance and Urban Affairs,* 102d Cong. 18-27 (1991) (Serial No. 102-45); *see also id.* at 640, 649 (letters from state attorneys general expressing concern over

The FCRA does nothing more than provide a federal framework to regulate a species of common-law privacy wrong, but that wrong is personal to the individual. A parallel example exists in the Copyright Act, 17 U.S.C. § 101 *et seq.*, which protects both a property and a privacy right. *See Harper & Row v. The Nation,* 471 U.S. 539, 554 (1985) (noting that common law copyright was often enlisted in the service of personal privacy"). In the absence of the statute's protection, both the property and the privacy rights evaporate on publication. *See generally* 1 M. Nimmer & D. Nimmer, Nimmer on Copyright § 4.04. Infringement currently lies only after application of the fair use defense, which analyzes both whether the work was published or unpublished, and the effect of the use on the actual or potential market. 17 U.S.C. § 107(2), (4); H.R. Rep. No. 94-1476, at 66 (1976) (noting that the statute did not expand the common-law cases). Thus, statutory damages may be available for violation of a statutory right, 17 U.S.C. § 504(c), but

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the actual harm done to consumers); *Fair Credit Reporting Act: Hearing before the Subcomm. on Consumer Affairs and Coinage of the H. Comm. on Banking, Finance and Urban Affairs*, 102d Cong. 86-87 (1991) (Serial No. 102-79) (describing how the every resident of Norwich Vermont was erroneously described as having tax liens on their property). As a result, the 1996 amendment not only added the provision discussed above, but also amended the statute (over strenuous industry objection, *see id.* at 145, 183, 263) to allow the FTC to collect civil penalties. Pub. Law No. 104-208, § 2416, 110 Stat. at 3009-450 (1996).

only after invasion of a property right or harm to a recognized personal privacy interest has occurred.[25]

2. The complaint lacks a causal link to reputational harm

The harm suffered by respondent boils down to two allegations: (1) that his personal employment prospects were "damaged" because the information is inaccurate and he remains unemployed; and (2) that he has suffered anxiety by virtue of the presence of

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[25] It may be argued that in the copyright context, Congress has created new rights to sue out of whole cloth, for example by restoring certain foreign works from the public domain. *See* 17 U.S.C. § 104A, *Golan v. Holder*, 132 S. Ct. 873 (2012). In addition to incorrectly mixing the privacy and property strands of copyright law, that argument conflates the power of Congress to create property rights under Article I with the manner in which it intended those rights to be enforced in the courts under Article III. 17 U.S.C. § 501 (giving rights only to the legal or beneficial owner to sue for infringement). For example, *amici* do not gainsay legislative ability to regulate false patent marking. *Compare* 35 U.S.C. § 292 (standing for competitive injury only). The prior version of 35 U.S.C. § 292 (2010) expressly delegated *qui tam* status to private individuals for any false marking of a patented item. Congress amended the statute to limit standing to those who had suffered competitive injury. Leahy-Smith America Invents Act, Pub. L. 112–29, §§ 16(b)(1)–(3), 125 Stat. 284, 329 (2011) (codified at 35 U.S.C §§ 292(a)-(c)). Assignment language does not exist in the FCRA—only state attorneys general and federal regulators can sue on behalf of the public. *See* 15 U.S.C. § 1681s(c). Unlike prior versions of the copyright statute or prior versions of the patent marking statute (respectively), the FCRA neither creates a property right nor delegates the United States' interests to individuals.

inaccurate information and ensuing worry about his diminished employment prospects. (First Amend. Compl. ¶¶ 35-37.)

With respect to the first claim, "damage," absent facts tending to satisfy the traditional elements of false light, defamation, or other privacy torts represents nothing more than a legal conclusion required by the statute. As such, that allegation fails under *Iqbal*. *See Iqbal*, 566 U.S. at 678-79. In the absence of allegations demonstrating a violation of a traditional privacy interest, the bald allegation of harm to employment requires additional information to demonstrate proximate cause, and is not entitled to the presumption of truth. *Id.*

Based entirely on public information, Spokeo has made respondent's reputation better than might otherwise be in that he is richer, married, and better educated. (*Cf.* First Amend. Compl. ¶¶ 30-34.) Insurance rates for many married men are, for example, often lower than those of single men,[26] and higher education and wealth make it more likely that a consumer will either gain a job or obtain a loan. Without more, none of the inaccuracies alleged in the complaint are of the sort that are "offensive to a person of ordinary sensibilities," Restatement of Torts § 867 comment c., or would "lower his

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[26] Fred Imbert, *The One Time Being Married May Cost You Less*, CNBC (Mar. 28, 2015), http://www.cnbc.com/id/102537119.

estimation in the community or cause third parties to refuse to deal with him." *Id.* § 559.

Respondent's second class of harm entirely derives from the first, namely, that his employment prospects have diminished, and he is anxious because he is unemployed. (First Amend. Compl. ¶ 37.) Indeed, respondent's anxiety over his employment situation is understandable, but it remains causally untethered to the defendant's alleged wrongs. Inaccurate information in and of itself does not create a cause of action under either traditional privacy law, *see* Restatement (Second) of Torts § 652E, comment c, or under the FCRA. Moreover, the complaint does not allege any facts suggesting that petitioner had done anything more invasive than cull public records and social media sites in which respondent, like millions of other Americans, participated. *See* Restatement (Second) of Torts § 652D, comments b, c (noting that "there is no liability for giving publicity to facts about the plaintiff's life that are matters of public record", and that "anyone who is not a hermit must expect and endure the ordinary incidents of the community life of which he is a part"); (Pet. Br. 4 (citing C.A. Supp. Excerpts of Record (ER) 22).)

In short, petitioner's alleged violation of the statute did not proximately cause harm to a privacy interest protected by the statute. With the addition of a few hypothetical facts, such allegations could proximately cause "damage" under the FCRA. For example, if respondent had applied for subsidized housing and had been denied because Spokeo incorrectly showed him as too rich, a cause of action

would lie. Similarly, if he was denied a job because a recipient of a consumer report wrongly thought him overqualified, an action would also lie. *E.g.*, Restatement (Second) of Torts § 652E (describing how false light may differ from defamation). *Amici* acknowledge that the respondent could rightly claim damages for the mental stress caused by any of these statements in a willful violation context; however, in each of these scenarios the defendant's actions are the proximate cause of actionable "damage." But these are not the facts that Mr. Robins has alleged.

Instead, respondent's suit seeks millions in damages because Spokeo has information about him and does not have a toll-free phone number, and has refused to receive certifications or provide a number of statutorily required notices to third parties. (*See* First Amend. Compl. ¶ 73 (alleging violation of 15 U.S.C. § 1681j(a)(1)(C) and 16 C.F.R. § 610.3).) That construction conflicts with the highly personal nature of privacy rights. Moreover even assuming that Spokeo actually disseminated information about him, the sins alleged by respondent lack a causal connection to personal reputational damage—namely, some degrading imputation, cognizable economic harm, or privacy invasion that would be offensive to a reasonable person. *Amici* do not suggest that this bar is a toweringly high one, only that it exists. The complaint does not pass it.

IV. CONCLUSION

Amici respectfully submit that if Congress meant to so radically test the bounds of standing and privacy it would have said so expressly. Neither the text, structure, purpose, or history of the statute suggests that Congress intended to confer standing beyond the traditional common law bounds, and the Court should not infer that intent without express legislative direction. Accordingly, the judgment of the Ninth Circuit should be REVERSED.

Respectfully Submitted,

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REPLY BRIEF

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In The
Supreme Court of the United States

SPOKEO, INC.,

Petitioner,

v.

THOMAS ROBINS,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF NATURAL RESOURCES DEFENSE COUNCIL, PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS, AND INSTITUTE FOR FISHERIES RESOURCES AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF THE AMICI CURIAE 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. The loss of a valuable personal entitlement is a concrete harm 5

A. A person deprived of a right the common law deemed valuable could bring suit to remedy that loss, regardless of whether the loss resulted in any collateral harm 5

B. Deprivation of a constitutional right is also sufficient basis for suit 8

C. Congress has the authority to create new entitlements, and to acknowledge their value 9

D. Standing jurisprudence treats deprivations of rights alike, regardless of the source of those rights 11

II. Requiring a plaintiff to show more than a concrete injury – even when that injury is not monetizeable – would depart from this Court's Article III jurisprudence 12

A. Deprivation of a valuable entitlement satisfies all elements of the injury-in-fact test 13

TABLE OF CONTENTS – Continued

Page

B. This Court has not required a plaintiff personally deprived of a valuable statutory entitlement to show more to satisfy the injury-in-fact requirement 15

C. Grafting a collateral-consequences requirement onto the injury-in-fact test would disrupt this Court's precedent 20

D. There is no justification for deviating from the established injury-in-fact test 21

III. Respect for separation of powers obliges courts to credit Congress's rational determinations that nonmonetary entitlements have value 24

CONCLUSION 27

TABLE OF AUTHORITIES

Page

CASES

Amnesty Int'l, USA v. Battle, 559 F.3d 1170 (11th Cir. 2009) 8

Ass'n of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150 (1970) 16, 17

Carey v. Piphus, 435 U.S. 247 (1978) 6, 8, 9

Dunmore v. United States, 358 F.3d 1107 (9th Cir. 2004) 16

Eldred v. Ashcroft, 537 U.S. 186 (2003) 11

Fed. Election Comm'n v. Akins, 524 U.S. 11 (1998) 17, 18, 19, 24

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167 (2000) 11, 17

Helphenstine v. Downey, 7 App. D.C. 343 (D.C. 1895) 7

Irish Lesbian & Gay Org. v. Giuliani, 143 F.3d 638 (2d Cir. 1998) 8

Jacobs v. Clark Cnty. School Dist., 526 F.3d 419 (9th Cir. 2008) 8

Lawrence v. McCalmont, 43 U.S. 426 (1844) 7, 16

Linda R.S. v. Richard D., 410 U.S. 614 (1973) 25, 26

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) ..... *passim*

Massachusetts v. EPA, 549 U.S. 497 (2007) 9, 15, 22, 25, 26

TABLE OF AUTHORITIES – Continued

Page

McGowan v. Maryland, 366 U.S. 420 (1961).....16

Pub. Citizen v. U.S. Dep't of Justice, 491 U.S. 440 (1989).....17, 19

Romer v. Evans, 517 U.S. 620 (1996).....22

R.R. Ret. Bd. v. Alton R.R. Co., 295 U.S. 330 (1935).....11

Shays v. Fed. Election Comm'n, 528 F.3d 914 (D.C. Cir. 2008).....17

Sierra Club v. Morton, 405 U.S. 727 (1972) 17

Summers v. Earth Island Inst., 555 U.S. 488 (2009).....14, 19

United States v. Richardson, 418 U.S. 166 (1974).....24

Vt. Agency of Natural Res. v. U.S. ex rel. Stevens, 529 U.S. 765 (2000).....24

Warth v. Seldin, 422 U.S. 490 (1975).....25, 26

Whitmore v. Arkansas, 495 U.S. 149 (1990).....7

Zivotofsky v. Kerry, 135 S. Ct. 2076 (2015) 10

Zivotofsky v. Sec'y of State, 444 F.3d 614 (D.C. Cir. 2006).....19

STATUTES AND REGULATIONS

5 U.S.C. § 552(a).....10

15 U.S.C. § 1681e(b) 13

16 U.S.C. § 1536(a)(2).....23

TABLE OF AUTHORITIES – Continued

Page

26 U.S.C. § 25 10

26 U.S.C. § 36 10

26 U.S.C. § 45R 10

38 U.S.C. § 1110 10

38 U.S.C. § 1121 10

38 U.S.C. § 1131 10

38 U.S.C. § 1141 10

42 U.S.C. § 402 10

42 U.S.C. § 12182 10

OTHER AUTHORITIES

Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U. L. Rev. 881 (1983) 14, 25

John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 Duke L.J. 1219 (1993) 26

Restatement (Second) of Torts (1965) 6, 7

BRIEF OF NATURAL RESOURCES DEFENSE COUNCIL, PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS, AND INSTITUTE FOR FISHERIES RESOURCES AS AMICI CURIAE IN SUPPORT OF RESPONDENT

INTEREST OF THE AMICI CURIAE[1]

The Natural Resources Defense Council (NRDC) is a nonprofit public-health and environmental membership organization with nearly 300,000 members across the United States. On behalf of its members, NRDC works to safeguard the Earth: its people, its plants and animals, and the natural systems on which all life depends. When an individual joins NRDC, she authorizes the organization to represent and promote her interest in a healthy environment. During its forty-five years of existence, NRDC has regularly brought federal suits for redress when private or governmental action has harmed its members' use or enjoyment of natural resources. Access to the federal courts to remedy injuries that, while not easily monetized, are nonetheless actual, concrete, and particularized, is crucial to NRDC's capacity to represent its members' interests. Petitioner's position, if endorsed by this Court, could erode settled law recognizing

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[1] Pursuant to S. Ct. R. 37.6, counsel for amici state that they authored this brief in its entirety and that no party or counsel for any party, nor any other person or entity other than amici or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Both parties have consented to the filing of this brief; evidence of consent has been lodged with the Clerk.

that such injuries are cognizable, just like pecuniary injuries.

The Pacific Coast Federation of Fishermen's Associations (PCFFA) is the largest trade association of commercial fishing families on the West Coast. For more than thirty years, PCFFA has fought for the rights of individual commercial fishermen and fishing families and for the long-term survival of commercial fishing as both a livelihood and a way of life. PCFFA and its members rely on access to the federal courts to protect not only individual fishermen's immediate economic health, but also less-easily monetized interests, including the ecological health and viability of the fishery resources upon which PCFFA's members, and their communities, depend.

The Institute for Fisheries Resources (IFR) is a nonprofit organization, originally founded by PCFFA, that carries out fishery and conservation research, and advocates for and implements environmental protections for the nation's fisheries, for the benefit of working fishing men and women and their fishing-dependent coastal communities. Access to federal courts to remedy threats to the ecological health of the nation's fisheries – even when those threats do not carry immediate economic consequences – furthers IFR's goal of building sustainable global and national fisheries.

SUMMARY OF ARGUMENT

This Court recognizes that the loss of a valuable entitlement is an injury in fact. This is true when the lost benefit's value is measurable in dollars and cents. It is also true, under this Court's precedent, when the benefit is not easily monetized, but has been confirmed as real and meaningful by the source of law that bestows it – whether that is the common law, the Constitution, or legislation passed by Congress. Congress, in particular, has broad latitude to create new statutory entitlements that, in its view, enhance recipients' well-being. Congress's recognition that *receiving* such an entitlement would bestow a substantial benefit on the individual for whom it is intended means that, when that individual is instead *deprived* of the ability to enjoy it, she loses something valuable – and thus suffers a concrete loss.

For these reasons, Petitioner Spokeo, Inc., is incorrect that Respondent has not suffered any "concrete harm." Respondent has alleged that Petitioner's actions deprived him of the enjoyment of a congressionally conferred entitlement to reasonably accurate reputational reporting. Such a loss *is* concrete. It is also actual and particular. It thus bears all the markings of a constitutionally sufficient injury in fact, even when unaccompanied by economic harm.

Petitioner, however, demands more, asking this Court to require certain plaintiffs seeking redress in the federal courts to demonstrate not just a discrete loss but, in essence, some additional collateral consequence

stemming from that loss. Such an addendum to the injury-in-fact test is inconsistent with this Court's precedent, which treats the deprivation of a nonmonetary entitlement, by itself, as a concrete injury. Grafting a collateral-consequences requirement onto the constitutional standing inquiry could render nonjusticiable injuries that this Court has long found sufficient, including the denial of a public records request under the Freedom of Information Act. And adding such a requirement selectively, only in cases where a plaintiff has alleged the loss of a noneconomic entitlement, would undermine decades of settled law holding that nonpecuniary harms – including lost recreational opportunities and lost aesthetic value – are cognizable just as monetary losses are.

The value of the entitlement Respondent claims to have lost may not be easily reduced to a dollar amount. But many essential public benefits, including clean air, pure water, and healthy ecosystems, cannot easily be monetized. That fact does not render them without social value, as this Court's standing jurisprudence recognizes. Moreover, Congress has determined that – just like the myriad nonmonetizeable interests this Court already recognizes – the entitlement Respondent lost *has* value that is now lost to him. Second-guessing that determination would upset the separation of powers that standing jurisprudence is designed to protect.

ARGUMENT

I. The loss of a valuable personal entitlement is a concrete harm

The common law has long provided redress for persons deprived of what rightfully belongs to them. In many actions at common law, the deprivation itself was the only injury the plaintiff needed to show in order to maintain suit, even if it resulted in no collateral harm. What mattered was the interference with a right that the common law deemed sufficiently valuable. By analogy, the federal courts have allowed individuals to bring suit against those who have deprived them of their constitutional rights, even when they cannot point to any measurable economic harm stemming from that deprivation.

Congress, no less than common-law judges, has the authority to create new entitlements and, by so doing, to recognize the benefits those entitlements provide – pecuniary or not. There is no difference for standing purposes between the loss of a benefit whose value is recognized by common law and the loss of a benefit whose value Congress has recognized: both are injurious.

A. A person deprived of a right the common law deemed valuable could bring suit to remedy that loss, regardless of whether the loss resulted in any collateral harm

The common law provided numerous causes of action to redress the loss of something that the law

entitled the plaintiff to have or to keep. Some such entitlements conferred on the plaintiff the right to a physical thing, the monetary value of which could be readily determined. For example, tort law made one who converted another's physical property to her own use liable for the full value of the chattel in question. *See* Restatement (Second) of Torts §§ 222, 222A cmt. c (1965) [hereinafter Restatement].

Other common-law entitlements conferred a right to something less tangible or susceptible to monetization, but which the common law nevertheless acknowledged was valuable and beneficial, and thus worthy of protection. For example, the common law protected the individual's right to be free from unlawful confinement, *see id.* § 35, and the right to vote in a public election or to hold office, *see id.* § 865; *see also* Pet'r Br. 24-25 (describing denial of the right to vote as "a cognizable, concrete harm" for which English common law allowed judicial redress). To maintain an action for interference with these rights, a plaintiff did not need to show that any collateral consequences resulted from the deprivation – only that the deprivation occurred. *See* Restatement § 907 cmt. b.

Likewise, the common law valued so highly the right to exclude others from one's land or personal property that it allowed, and even encouraged, plaintiffs to challenge otherwise harmless interference with those rights, by authorizing the award of nominal damages in such actions. *See id.*; *Carey v. Piphus*, 435 U.S. 247, 266 (1978). Deprivation of the right to exclude can sometimes result in collateral harm: for

example, a property owner may suffer anxiety from the perception that she has lost control over her own land. However, nothing in the cause of action *required* a plaintiff to suffer such insecurity in order to maintain a suit. *See* Restatement §§ 158, 907 cmt. b.[2]

The common law also allowed suit when a plaintiff was deprived of something to which she was contractually entitled – even when the deprivation resulted in no measurable damages. *E.g.*, *Helphenstine v. Downey*, 7 App. D.C. 343, 349-50 (D.C. 1895). In many such cases, a plaintiff may have given up something vanishingly small during negotiations in order to secure the particular corresponding promise that became the subject of her suit. *See, e.g.*, *Lawrence v. McCalmont*, 43 U.S. 426, 452 (1844) (finding that a payment of one dollar constituted sufficient consideration to create a binding contract). In the statutory-entitlement context, Congress's recognition that an entitlement has value is at least as reliable an indicator

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[2] Petitioner suggests that the concrete harm that supported common-law trespass actions was not the loss of the right to exclude, but the possibility that repeated, unchallenged trespasses could waive the landowner's right to her property. Pet'r Br. 25-26. Maintaining a trespass suit did not require any showing that a particular invasion of the right to exclude, if unaddressed, was likely to contribute to future waiver – let alone that such an outcome was "certainly impending," as opposed to speculative, as this Court requires Article III injuries to be. *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990). Rather, all that was required was a showing that the defendant intentionally entered land in possession of another, thereby depriving the plaintiff of her right to exclude. *See* Restatement § 158.

that a plaintiff has lost something of value as the supposition – if not outright legal fiction – that she made a meaningful bargaining sacrifice for it.

There is an obvious reason the common law endorsed these varied causes of action to protect deprivations that may not have resulted in any detectable economic harm: our society values many interests that are not easily monetized, and whose worth is not easily proven by objective, external evidence. Notwithstanding their abstract value, the common law recognized that their invasion or loss was itself a meaningful injury, and thus allowed suits to remedy such invasions or losses, regardless of whether any collateral consequences resulted. That the courts are open to a person deprived of *whatever* the law guarantees her is thus a cornerstone of the common-law tradition on which Article III jurisprudence is built.

B. Deprivation of a constitutional right is also sufficient basis for suit

Analogizing to the established common-law tradition, this Court has held that suits for nominal damages are available to rectify the deprivation of rights guaranteed by the Constitution, just as they are available to redress the deprivation of rights valued by the common law. *Carey*, 435 U.S. at 266; *see also, e.g.*, *Amnesty Int'l, USA v. Battle*, 559 F.3d 1170, 1177-78 (11th Cir. 2009); *Jacobs v. Clark Cnty. School Dist.*, 526 F.3d 419, 426-27 (9th Cir. 2008); *Irish Lesbian & Gay Org. v. Giuliani*, 143 F.3d 638, 651 (2d

Cir. 1998). The reason for making such suits justiciable, even in the absence of any measurable collateral consequences, is the same as under the common law: "the law recognizes the importance to organized society that those rights be scrupulously observed." *Carey*, 435 U.S. at 266. Thus, while the denial of constitutional rights can result in any number of collateral hardships, even the deprivation itself, standing alone, is a sufficient basis for suit. *See id.*

C. Congress has the authority to create new entitlements, and to acknowledge their value

The common law and the Constitution are not the sole sources of valuable, protectable legal entitlements in our society. Congress may, within the scope of its powers, create laws that give individuals the right to obtain some status or thing that Congress deems valuable. In creating such entitlements, Congress is not confined to recognizing the kinds of rights honored by the common law. *See Massachusetts v. EPA*, 549 U.S. 497, 516 (2007); *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 580 (1992) (Kennedy, J., concurring) ("As Government programs and policies become more complex and farreaching, we must be sensitive to the articulation of new rights of action that do not have clear analogs in our common-law tradition.").

Nor is Congress confined to creating entitlements with obvious economic benefits. To be sure, Congress

can create and has created statutory entitlements for certain individuals to receive money payments from the government, *e.g.*, 38 U.S.C. §§ 1110, 1121, 1131, 1141 (wartime and peacetime disability and death benefits for veterans); 42 U.S.C. § 402 (social security payments), as well as to receive credits that defray tax liability by a certain amount, *e.g.*, 26 U.S.C. §§ 25 (home mortgage interest credit), 36 (first-time homebuyer credit), 45R (small-business health insurance credit). But Congress has also created a diverse array of entitlements whose values are not easily monetized.

For example, through the Freedom of Information Act (FOIA), Congress created a universal entitlement to access to government records. 5 U.S.C. § 552(a). In the Americans with Disabilities Act, it created, among other rights, an entitlement for disabled persons to enjoy public accommodations on an equal basis with the rest of the public. 42 U.S.C. § 12182. And Congress has crafted myriad other miscellaneous rights with no clear dollar value. *See, e.g.*, *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2082-83 (2015) (describing statutory entitlement for persons born in Jerusalem to have Israel listed as their birth country on passport, ultimately struck down on the merits for interfering with President's power to conduct foreign affairs).

In all cases – whether the entitlement at issue is novel or traditional, pecuniary or nonmonetizeable – the courts "defer substantially" when Congress has exercised its power to recognize the entitlement's

value to its recipients. *Eldred v. Ashcroft*, 537 U.S. 186, 204-05 (2003). So long as Congress has acted rationally within its enumerated powers, the courts "are not at liberty to second-guess congressional determinations and policy judgments." *Id.* at 208; *see also R.R. Ret. Bd. v. Alton R.R. Co.*, 295 U.S. 330, 346 (1935) ("Even should we consider [a statute] unwise if it be fairly within delegated power, our obligation is to sustain it.").

Therefore, once Congress has rationally created an entitlement that is within its power to bestow, and thus has recognized that the entitlement is valuable, courts should take the entitlement's value as given when assessing whether the deprivation of that entitlement harms a plaintiff. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 185 (2000) (granting "judicial attention and respect" to "congressional determination" bearing on factual basis of plaintiff's standing claim). In other words, the courts should accept that a person deprived of an entitlement Congress deems beneficial – even a novel or nonmonetary one – has lost something of value.

D. Standing jurisprudence treats deprivations of rights alike, regardless of the source of those rights

When the common law values an entitlement, the deprivation of that entitlement, by itself, is a cognizable injury. *See* Section I.A, *supra*. When the Constitution enshrines a right, the deprivation of the

right, by itself, is a cognizable injury. *See* Section I.B, *supra*. It is axiomatic that the source of a right does not affect whether a plaintiff has standing to vindicate it. *Lujan*, 504 U.S. at 576 ("[T]here is absolutely no basis for making the Article III inquiry turn on the source of the asserted right."). Therefore, when Congress validly recognizes some condition's value by creating an entitlement to that condition, it must follow that the deprivation of that entitlement, by itself, is a cognizable injury, sufficient to satisfy Article III. To hold otherwise would ignore this Court's precedent to that effect. *See* Section II, *infra*. It would also treat a duly enacted legislative determination that an entitlement is valuable differently – and worse – for standing purposes than the same determination made by the common law or the Constitution. Precedent forecloses such discrimination, *see id.*, as does due consideration for the fact that Congress, no less than common-law judges, has authority to determine what benefits are important enough to be protectable rights.

II. Requiring a plaintiff to show more than a concrete injury – even when that injury is not monetizeable – would depart from this Court's Article III jurisprudence

It follows from this Court's treatment of common-law and constitutional rights that deprivation of a valuable statutory entitlement is a justiciable injury in fact. That is what Respondent has alleged. In promulgating Section 1681e of the Fair Credit Reporting

Act, Congress entitled individuals to reasonably accurate reporting of their personal information by consumer reporting agencies, including on the Internet. *See* 15 U.S.C. § 1681e(b). In the Internet era, the ability to control the contents of one's public persona and reputation has taken on special significance: inaccurate personal information posted online – whether positive, negative, or neutral – is globally accessible and can be nearly impossible to erase, even after deleting or removing the original source of the misstatement. The right to a reasonably accurate online dossier gives individuals security and confidence that they will rarely, if ever, have to go through the ordeal of correcting some inaccurate characterization, and then tracking down and correcting every repetition, or living with a misrepresentation that gains a life of its own in the digital ether. By allegedly failing to use reasonable methods to ensure that information it published about Respondent was accurate, Petitioner deprived Respondent of a state of ease that Congress reasonably deemed valuable. That loss is justiciable.

Petitioner claims that this loss, standing by itself, cannot satisfy Article III. *See, e.g.*, Pet'r Br. 2, 9, 36-53. But precedent holds otherwise. There is no good reason to deviate from that established precedent here.

A. Deprivation of a valuable entitlement satisfies all elements of the injury-in-fact test

Under this Court's precedent, the first of the "three elements" comprising "the irreducible constitutional

minimum of standing" – and the only one at issue in this case – provides that "the plaintiff must have suffered an injury in fact." *Lujan*, 504 U.S. at 560 (internal quotation marks omitted). An injury in fact is "an invasion of a legally protected interest," which is "concrete," "particularized," and "actual or imminent, not conjectural or hypothetical." *Id.* (internal quotation marks omitted). Being deprived of a meaningful statutory benefit fits that bill.

As an initial matter, when the "plaintiff is himself an object of the action" challenged, "there is ordinarily little question" that the plaintiff has standing. *Lujan*, 504 U.S. at 561-62; *see also Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009); Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U. L. Rev. 881, 894 (1983). In this case, there is no question that Respondent is the object of the challenged misstatements: Petitioner gathered personal data about Respondent and, from that data, posted allegedly incorrect statements specifically about Respondent. It should therefore be "substantially" easier for Respondent to prove that he has standing than it would be for someone claiming to be harmed by some action that did not involve her. *See Summers*, 555 U.S. at 493.

Applying the *Lujan* injury factors show why Respondent has standing. First, the loss of an entitlement that Respondent would have received, if not for Petitioner's alleged wrongdoing, has long been considered a sufficiently concrete and compelling

basis for suit. *See* Section I, *supra*. When, as here, Congress, through legislation, determines that the right in question has value to individuals, there is no warrant for judges to dispute that the entitlement would have benefited the Respondent if received, and therefore that its loss is injurious. Second, because Respondent is asserting a violation of his own, personal right, and Petitioner targeted him specifically by compiling and sharing information expressly about him, there can be no doubt that Respondent's injury is sufficiently "particularized." *Lujan*, 504 U.S. at 560. Third, because the deprivation has already occurred, Respondent's injury is "actual or imminent." *Id.*

These factors met, the established injury-in-fact test is satisfied. *See Lujan*, 504 U.S. at 560; *Massachusetts*, 549 U.S. at 517.

B. This Court has not required a plaintiff personally deprived of a valuable statutory entitlement to show more to satisfy the injury-in-fact requirement

Petitioner contends that, although Respondent has alleged the deprivation of a valuable (though nonmonetary) statutory benefit, he must point to some additional, harmful consequence stemming from that loss before he can satisfy the injury-in-fact test. Precedent does not support the existence of any such added requirement.

By way of comparison, when a plaintiff is denied a monetary statutory entitlement, courts generally do

not inquire into the existence of any collateral consequences stemming from that loss. For example, when a plaintiff complains of a denied tax refund – a beneficial entitlement bestowed by Congress – courts do not pause to verify that being denied the money had any collateral impacts on plaintiff: they simply find that the loss of the benefit is a concrete injury. *See, e.g.*, *Dunmore v. United States*, 358 F.3d 1107, 1111-12 (9th Cir. 2004) (holding IRS denial of refund was injury in fact, without inquiry into whether denial had collateral impacts). It is easy to imagine scenarios in which denial of that entitlement would have no meaningful collateral impacts on a claimant – for example, if a billionaire were denied a fifty-dollar (or fifty-cent) tax refund. But even then, a court would almost certainly acknowledge that the injury was justiciable. *Cf. Lawrence*, 43 U.S. at 452 (adjudicating breach of contract claim, where contract had been secured by payment of one dollar); *McGowan v. Maryland*, 366 U.S. 420, 424 (1961) (adjudicating challenge to five-dollar fine).

The same rules must apply when a plaintiff is deprived of a discrete benefit whose value is not monetizeable. For all the reasons discussed above, loss of a valuable entitlement can be a concrete injury, even if its value is not easily monetized. Such a noneconomic injury confers Article III standing just as surely as a pecuniary injury does. *E.g.*, *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 154 (1970) ("We mention these noneconomic values to emphasize that standing may stem from

them as well as from . economic injury. "); *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972). The values offended by such injuries, including "[a]esthetic and environmental well-being," *Morton*, 405 U.S. at 734, and "spiritual" values, *Ass'n of Data Processing Serv. Orgs., Inc.*, 397 U.S. at 154, are – no less than "economic well-being" – "important ingredients of the quality of life in our society," *Morton*, 405 U.S. at 734. Thus, for the purpose of assessing standing, a plaintiff who has been deprived of a thousand dollars is no differently situated than one who has lost the opportunity to enjoy a favorite hiking spot. *See, e.g.*, *Laidlaw*, 528 U.S. at 182-83. Or one who can no longer fish or hunt in a favorite place. *See, e.g.*, *id.* Or one who has been denied access to records in which she has an interest. *See, e.g.*, *Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 449-50 (1989). All have lost something of value, and thus all are injured.

Consistent with this precedent, this Court has treated plaintiffs deprived of *non*monetized statutory entitlements the same as those deprived of pecuniary benefits. For instance, the denial of a statutory right to information is an established Article III injury. *E.g.*, *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 21 (1998) (holding inability to obtain information required to be disclosed by statute was injury); *Pub. Citizen*, 491 U.S. at 449 (same); *Shays v. Fed. Election Comm'n*, 528 F.3d 914, 923 (D.C. Cir. 2008) (same).

Petitioner claims that *Akins* and *Public Citizen* actually support its heightened injury test, because the Court in both cases noted that denial of the

informational right at issue would also have "separate, particularized, concrete effects on the plaintiffs." Pet'r Br. 43 (emphasis omitted); *see also* Br. of Amici Chamber of Commerce et al. 8-9. But neither of those cases stands for the proposition that such a showing is *required* when a defendant has extinguished a plaintiff's personal entitlement. In fact, they show the opposite.

Akins invokes collateral consequences not to show that the plaintiffs' injury is concrete, but that it is *particular*. *Akins* states that the "injury in fact" it recognizes "consists of [plaintiffs'] inability to obtain information the statute requires that [defendant] make public." 524 U.S. at 21. It goes on to note that the deprivation in that case hindered the plaintiffs' ability to educate themselves about candidates for elected office. *Id.* But the import of those collateral effects is not to show that the plaintiffs' deprivation is meaningful, but rather to show that it was uniquely felt by them. In violating the disclosure law at issue in *Akins*, the defendant had taken no action specifically directed toward the plaintiffs: it had simply failed to publicize information that the law required be available to the public at large. The threat of collateral effects on plaintiffs' voting behavior thus provided assurance that the plaintiffs were *particularly* injured by the defendant's failure, and thus that they suffered more than a "generalized grievance" common

to all. *See id.* at 23-25.[3] When, as in this case, a defendant targets and specifically deprives a plaintiff of a right personal to him, such assurances are not necessary.

Indeed, *Public Citizen* says so explicitly. The defendant in that case *did* target the plaintiff, by denying the plaintiff's personal request to view certain information. 491 U.S. at 447. This Court was unequivocal that any collateral consequences resulting from the denial of such an individual request are extraneous to the injury analysis:

> Our decisions interpreting the Freedom of Information Act have never suggested that those requesting information under it need show more than that they sought and were denied specific agency records.

Id. at 449; *see also Zivotofsky v. Sec'y of State*, 444 F.3d 614, 617 (D.C. Cir. 2006) ("Anyone whose request for specific information has been denied has standing to bring an action; the requester's circumstances – why he wants the information, what he plans to do with it, what harm he suffered from the failure to disclose – are irrelevant to his standing."). If this Court were to change course and require plaintiffs to

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[3] The potential for collateral consequences plays a similar role in cases where the government's failure to adhere to a generally applicable procedural requirement denies plaintiff (along with everyone else) the opportunity to exercise some procedural right. *See, e.g.*, *Lujan*, 504 U.S. at 572-73; *Summers*, 555 U.S. at 496-97.

"show more" than deprivation of a statutory right to have standing, as Petitioner suggests is necessary in this case, numerous meritorious FOIA actions could be stymied. A plaintiff making a records request does not know in advance what information that inquiry will yield. That being the case, FOIA plaintiffs frequently cannot say, before seeing the information to which they are entitled, whether being denied the information will have any collateral impact, or what that impact will be.

This Court's informational-injury jurisprudence, along with the long-standing treatment of lost entitlements at common law, refutes the claim that a plaintiff deprived of a particularized, nonmonetizeable right must suffer additional harm before she may recover what she has lost. Instead, it confirms that the Court treats injuries to difficult-to-monetize statutory entitlements and injuries to pecuniary benefits the same way for Article III purposes.

C. Grafting a collateral-consequences requirement onto the injury-in-fact test would disrupt this Court's precedent

Petitioner is not seeking to safeguard this Court's injury-in-fact test, but to rewrite it. Accepting Petitioner's reimagining of standing law could render nonjusticiable injuries the courts have found to satisfy Article III – for example, the denial of records under FOIA, as explained above.

Moreover, if Petitioner's collateral-consequences rule were applied *only* in cases like this one, where a plaintiff suffers a nonmonetizeable loss, the disruption to settled precedent could be even greater. Placing a more stringent burden on plaintiffs alleging a nonmonetary injury would break the historic parity between monetizeable and nonmonetizeable injuries. *See* Section II.B, *supra*. Moreover, it would inject into standing jurisprudence the possibility – perhaps the inevitability – that a judge's subjective view of how important a plaintiff's loss was, and how serious its effects were, could defeat that plaintiff's ability to remedy a concrete deprivation.

Suits to vindicate recreational, aesthetic, spiritual, and other interests that some may view as less weighty than economic interests have been long blessed by this Court, and by the common law before that. *See* Sections I.A, II.B, *supra*. Undermining their legitimacy would dramatically shrink the range of interests the federal courts have long been open to protect.

D. There is no justification for deviating from the established injury-in-fact test

Underlying Petitioner's argument is a fear that recognizing the injury suffered by plaintiffs deprived of valuable entitlements will open the floodgates to new types of suits. But, for all the reasons stated above, this Court's precedent *already* recognizes such injury – even when the deprivation carries no obvious

economic consequences. Respecting that precedent in no way undermines standing law's limiting principles.

First, affirming Congress's already-acknowledged power to create entitlements and recognize their value is not tantamount to allowing Congress to "override the Constitution's injury-in-fact requirement." Pet'r Br. 14. When Congress determines that a new right will benefit an individual, it logically follows that losing the right leaves that individual worse off than she would have been. In such a case, Congress has not abrogated the injury requirement: it has simply altered the baseline condition from which injury is assessed. Doing so is Congress's right. *See Massachusetts*, 549 U.S. at 516; *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring). Moreover, it is not an unbounded right. The Court will defer to Congress's determination of an entitlement's value only when Congress has acted rationally, within the reach of its enumerated powers. *See* Section I.C, *supra*. While rational-basis review is not searching, it is still a hurdle that must be cleared – and not one that this Court assumes is met as a matter of course. *See, e.g.*, *Romer v. Evans*, 517 U.S. 620, 632 (1996) (holding that amendment to state constitution lacked a rational relationship to any legitimate governmental end).

Second, reaffirming that the denial of a valuable entitlement constitutes an injury does not mean that *every* statutory violation will confer standing. Not all statutory provisions create valuable rights running to a specific individual. The provision of the Endangered

Species Act at issue in *Lujan*, for example, creates an obligation for federal agencies to consult with the Secretary of the Interior before taking certain actions. 16 U.S.C. § 1536(a)(2); *Lujan*, 504 U.S. at 558. It does not confer a specific privilege on any individual citizen. Thus, while violations of that statute may, and often do, injure individuals within the meaning of Article III, there is no personal deprivation inherent in the violation itself – or in the violation of other statutes like it, unless the plaintiff can show some particularized harm stemming from that violation. *See Lujan*, 504 U.S. at 572-73. And if, as Petitioner fears, a savvy future plaintiff attempts to read a personal entitlement into a statute that does not provide one, *see* Pet'r Br. 38, the courts are more than capable of telling a legitimate statutory interpretation from a feeble one.

Third, affirming that the deprivation of a statutory right is itself a basis for standing does not open the door to Congress's dressing of generalized grievances in individual entitlements' clothing – for example, by creating a so-called right to see that the laws are enforced. There is nothing talismanic about Congress invoking words like "right" or "entitlement." What matters is whether Congress has bestowed something it rationally deems to have value on an individual. Further, injury exists irrespective of collateral consequences where an entitlement has been denied *with respect to a particular individual* – for example, when an agency denies an individual's record request, or when Petitioner published misstatements about

Respondent in particular. *See* Section II.B, *supra*. A plaintiff who has lost a nominal right because of actions not specifically targeting her may still have to show that she raises more than a "generalized grievance" to bring suit. *See Akins*, 524 U.S. at 23-25; *United States v. Richardson*, 418 U.S. 166, 176 (1974). As this Court's *qui tam* jurisprudence makes plain, Congress cannot legislate around this requirement by granting an individual a right to collect a bounty. *See Vt. Agency of Natural Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 772-73 (2000).

III. Respect for separation of powers obliges courts to credit Congress's rational determinations that nonmonetary entitlements have value

There are compelling reasons not to revise the injury-in-fact test as Petitioner wishes. Most salient, erecting an additional bar to standing in this case would undermine Congress's determination that the entitlement it has created has value, such that its loss really is harmful, in the same way that losing even a modest monetary entitlement always is. For the reasons explained above, such selective treatment of nonmonetizeable injuries threatens to disrupt decades of precedent. *See* Section II.C, *supra*. It also allows the intuition of judges to strip Congress of legislative power.

Discounting Congress's judgment that an entitlement has sufficiently substantial value to be

recognized in enacted, enforceable law trammels Congress's acknowledged power to create new "legal rights, the invasion of which creates standing." *Warth v. Seldin*, 422 U.S. 490, 500 (1975) (quoting *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973)); *see also Lujan*, 504 U.S. at 578. "Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before." *Massachusetts*, 549 U.S. at 516 (quoting *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring)). One way for Congress to exercise this power is to determine that receiving some entitlement would benefit an individual, and therefore that losing it makes her meaningfully worse-off. To avoid inflating their power at Congress's expense, the courts should view deferentially such determinations – including when the benefit Congress recognizes is novel or unusual. Judges should "be sensitive to the articulation of new rights of action." *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring).

One guiding principle of Article III jurisprudence is that the courts should not presume to resolve the types of political disputes best left to the other branches. *See Lujan*, 504 U.S. at 559-60, 577; *see also* Scalia, at 881-82 ("[T]he judicial doctrine of standing is a crucial and inseparable element of th[e] principle [of separation of powers], whose disregard will inevitably produce an overjudicialization of the processes of self-governance."). But the courts can also damage the separation of powers by refusing to acknowledge and redress injuries that the Constitution

intends *Congress* to define. The separation of powers is "a zero-sum game": "[i]f one branch unconstitutionally aggrandizes itself, it is at the expense of one of the other branches." John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 Duke L.J. 1219, 1230 (1993). Here, if the courts decline to hear Respondent's case, it is Congress that stands to lose the full measure of a power that this Court has repeatedly acknowledged is Congress's own to exercise: the power to create new, legally enforceable rights. *See Linda R.S.*, 410 U.S. at 617 n.3; *Warth*, 422 U.S. at 500; *Lujan*, 504 U.S. at 578; *Massachusetts*, 549 U.S. at 516.

* * *

A plaintiff who has lost the opportunity to enjoy what Congress determines would benefit her – whether that be an accurate online reputation or a dollar – is concretely harmed. Petitioner cannot draw distinctions between the former and latter cases without slicing into the heart of this Court's Article III jurisprudence.

CONCLUSION

For these reasons, this Court should reject Petitioner's arguments.

Respectfully submitted,

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REPLY BRIEF

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Supreme Court of the United States

SPOKEO, INC.,

Petitioner,

v.

THOMAS ROBINS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Respondent.

ON A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF AMICI CURIAE NEW ENGLAND LEGAL FOUNDATION AND ASSOCIATED INDUSTRIES OF MASSACHUSETTS IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. FEDERAL COURTS HAVE NO ARTICLE III JURISDICTION OVER A CLAIM FOR THE BARE VIOLATION OF STATUTORY DUTIES.. 5

A. A Breach Of Statutory Duties Is Not An Injury In Fact Under Article III Unless The Breach Has Caused The Plaintiff To Suffer A Concrete, *De Facto* Harm. 8

B. The Ninth Circuit Conflated "Injury In Law" With Injury In Fact When It Misinterpreted This Court's Key Precedent On The Issue. 10

C. By Conflating Injury In Law With Injury In Fact, The Ninth Circuit Abdicated The Judiciary's Duty, Under *Marbury v. Madison*, To Decide Whether A Federal Statutory Claim Comports With Article III. 13

II. BY ALLOWING AN UNINJURED PLAINTIFF TO PROCEED WITH HIS CLAIM FOR THE BARE VIOLATION OF STATUTORY DUTIES, THE NINTH CIRCUIT INTRUDED UPON THE EXCLUSIVE POWER OF THE EXECUTIVE BRANCH TO ENFORCE THE LAW, IN VIOLATION OF THE SEPARATION OF POWERS. 15

CONCLUSION 19

TABLE OF AUTHORITIES

CASES

Alabama Legislative Black Caucus v. Alabama,
135 S. Ct. 1257 (2015) 13

Clapper v. Amnesty Int'l USA,
133 S. Ct. 1138 (2013) 7, 16

DaimlerChrysler Corp. v. Cuno,
547 U.S. 332 (2006) 16

F.W. Woolworth Co. v. Contemporary Arts, Inc.,
344 U.S. 228 (1952) 9

FW/PBS, Inc. v. Dallas,
493 U.S. 215 (1990) 13

Gomez v. United States,
490 U.S. 858 (1989) 9

Lewis v. Casey,
518 U.S. 343 (1996) 8, 11, 12

Lexmark Int'l, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377 (2014) 6, 10

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992) .....*passim*

Marbury v. Madison,
1 Cranch 137, 2 L. Ed. 60 (1803) 4, 13, 14, 18

Raines v. Byrd,
521 U.S. 811 (1997) 8, 11, 16

Robins v. Spokeo, Inc.,
742 F. 3d 409 (9th Cir. 2014) 7, 10, 11, 12

Steel Co. v. Citizens for a Better Env't,
523 U.S. 83 (1998) 9, 11, 16, 17

Summers v. Earth Island Inst.,
555 U.S. 488 (2009) 8, 11

Warth v. Seldin,
422 U.S. 490 (1975) .....*passim*

STATUTES

15 U.S.C. § 45(a)..... 18

15 U.S.C. §§ 1681-1681x 6

15 U.S.C. § 1681n(a)(1)(A) 6

15 U.S.C. § 1681n(a)(2) 6

15 U.S.C. § 1681n(a)(3) 6

15 U.S.C. § 1681s(a)(1)..... 18

15 U.S.C. § 1681s(a)(2)(A)..... 18

15 U.S.C. § 1681s(a)(2)(B)..... 18

15 U.S.C. § 1681s(b)(1)..... 18

15 U.S.C. § 1681s(c)(1)(A) 18

15 U.S.C. § 1681s(c)(1)(B)(i)..... 18

CONSTITUTIONAL AND OTHER AUTHORITIES

U.S. Const. art. I, § 8 ..... 4, 11

U.S. Const. art. II, § 3 ..... 5, 15

U.S. Const. art. III, § 2 ..... *passim*

Leonard & Joanne C. Brant, *The Half-Open Door: Article III, the Injury-in-Fact Rule, and the Framers' Plan for Federal Courts of Limited Jurisdiction*, 54 Rutgers L. Rev. 1 (2001) 18

Michael E. Rosman, *Standing Alone under the Fair Housing Act*, 60 Mo. L. Rev. 547 (1995) 8, 14

Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U. L. Rev. 881 (1983) 16

Craig A. Stern, *Another Sign from Hein: Does the Generalized Grievance Fail a Constitutional or a Prudential Test of Federal Standing to Sue?*, 12 Lewis & Clark L. Rev. 1169 (2008) 17

INTEREST OF AMICI CURIAE

Amici curiae New England Legal Foundation ("NELF") and Associated Industries of Massachusetts ("AIM") seek to present their views, and the views of their supporters, on whether Article III of the United States Constitution permits a federal court to exercise jurisdiction over a claim for relief from the bare violation of statutory duties.[1]

NELF is a nonprofit, nonpartisan, public interest law firm, incorporated in Massachusetts in 1977, and headquartered in Boston. Its membership consists of corporations, law firms, individuals, and others who believe in NELF's mission of promoting balanced economic growth in New England, protecting the free enterprise system, and defending economic rights. NELF's members and supporters include both large and small businesses located primarily in the New England region.

AIM is a 100-year-old nonprofit, nonpartisan association, with over 4,500 employer members doing business in the Commonwealth. AIM's mission is to promote the well-being of its members and their employees, and the prosperity of the Commonwealth of Massachusetts, by improving the economic climate of Massachusetts, advocating fair

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[1] Pursuant to Supreme Court Rule 37.6, amici state that no counsel for a party authored this brief in whole or in part, and no person or entity, other than amici, made a monetary contribution to the preparation or submission of the brief.

Pursuant to Supreme Court Rule 37.3(a), amici also state that counsel of record for the petitioner and for the respondent have filed with the Court their respective blanket consent letters, consenting to the filing of amicus curiae briefs in support of either or neither party.

and equitable public policy proactively, and by providing relevant and reliable information and excellent services.

Amici are committed to upholding Article III's limits on the Federal Judiciary's subject matter jurisdiction, and to preserving the separation of powers among the three branches of government. Enforcement of those principles is especially important to amici when, as here, an uninjured plaintiff (and putative representative of a class of similarly uninjured individuals) seeks to impose liability on a business for a potentially large, aggregated award of statutory damages, and reasonable attorney's fees, based on allegations of a bare violation of a statute. In this connection, amici filed a brief on the same issue in *Edwards v. First American Corp.*, 610 F.3d 514 (9th Cir. 2010), *cert. granted*, 131 S. Ct. 3022 (2011), *cert. dismissed as improvidently granted*, 132 S. Ct. 2536 (2012).

For these and other reasons discussed below, NELF and AIM believe that their brief will assist the Court in deciding whether Article III allows a federal court to exercise jurisdiction over a claim for the bare violation of a statutory duty.

SUMMARY OF ARGUMENT

Article III of the Constitution restricts a federal court's jurisdiction to "cases" and "controversies," thereby requiring the plaintiff to plead and prove a concrete, particularized injury in fact. However, the Ninth Circuit has interpreted the federal statute at issue, the Fair Credit Reporting Act ("FCRA"), as allowing the recovery of statutory damages for the mere breach of statutory duties.

According to the Ninth Circuit, Congress has not required the plaintiff to show any resulting concrete harm. Nor has the respondent in this case alleged any such cognizable injury in his complaint.

The complaint should be dismissed for lack of subject matter jurisdiction. Under Article III, the breach of a statutory duty ("injury in law") is not an injury in fact. To be sure, the breach of a statutory duty may *cause* an injury in fact, thereby giving rise to a potentially justiciable claim in federal court. However, Article III prevents Congress from manufacturing an injury in fact, contrary to the Ninth Circuit's interpretation of the FCRA in this case. Accordingly, the FCRA should be interpreted as requiring an injury in fact. Therefore, statutory damages should be available only to the injured plaintiff who cannot quantify his harm or who has suffered a minimal quantifiable harm.

The Ninth Circuit, by contrast, held that the respondent has Article III standing to sue for the bare violation of his statutory rights. The lower court erred, primarily by conflating an injury in law with an injury in fact. This confusion rests on a misinterpretation of this Court's key precedent discussing Article III standing. For one, the Ninth Circuit misconstrued language from *Warth v. Seldin*, 422 U.S. 490, 500 (1975) ("The injury required by Art[icle] III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing.") (citations and internal quotation marks omitted). The Ninth Circuit misinterpreted this language to mean that a mere breach of statutory duties establishes an injury in fact under

Article III and, therefore, that Congress is free to create a private damages remedy for such breach.

Warth says no such thing. As the Court subsequently explained in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 578 (1992), this quoted language from *Warth* means that the violation of a statutory right *may* satisfy Article III standing, but only when the statutory violation has caused a concrete, *de facto* harm.

But the Ninth Circuit also misinterpreted this very explanation of *Warth* in *Lujan*. The court misread *Lujan*'s "concrete, *de facto* harm" as merely requiring the plaintiff to establish a violation of a personal statutory right, as opposed to a statutory right belonging to the general public. While Article III does indeed require the violation of a personal right, it also requires the plaintiff to show that such violation caused him actual harm.

By conflating injury in law with injury in fact, the Ninth Circuit effectively abdicated the Federal Judiciary's duty to determine whether a federal statutory claim comports with the requirements of Article III, as established in *Marbury v. Madison*, 1 Cranch 137, 2 L. Ed. 60 (1803). According to the Ninth Circuit, Congress may create Article III standing whenever it exercises its broad plenary powers under Article I, § 8 of the Constitution. Under this erroneous view, a case or controversy is whatever Congress, and not the Judiciary, says it should be.

In so deciding, the Ninth Circuit also violated the separation of powers, which is a cornerstone of the Court's Article III jurisprudence. The lower court, purportedly acting at the behest of Congress, allowed an uninjured plaintiff (who is also a putative class representative) to proceed as if he were an agent of the Executive Branch seeking to enforce the defendant's statutory duties owed to consumers. In exceeding its Article III powers, then, the Ninth Circuit intruded upon the exclusive and discretionary role of the Executive Branch to "take Care that the Laws be faithfully executed " U.S. Const. art. II, § 3.

ARGUMENT

I. FEDERAL COURTS HAVE NO ARTICLE III JURISDICTION OVER A CLAIM FOR THE BARE VIOLATION OF STATUTORY DUTIES.

At issue is whether Article III of the United States Constitution permits a federal court to exercise jurisdiction over a claim for relief from the bare violation of statutory duties. Article III limits the Federal Judiciary's subject matter jurisdiction to "cases" and "controversies."[2] To satisfy this

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[2] Article III provides, in relevant part:

> The judicial Power shall extend to all *Cases*, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all *Cases* affecting Ambassadors, other public Ministers and Consuls;—to all *Cases* of admiralty and maritime Jurisdiction;—to *Controversies* to which the United States shall be a Party;—to

jurisdictional requirement, the plaintiff must allege and prove that he has suffered "a concrete and particularized 'injury in fact' ." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386 (2014).

Notwithstanding this threshold jurisdictional requirement of injury in fact, the Ninth Circuit has interpreted the statute at issue, the Fair Credit Reporting Act, 15 U.S.C. §§ 1681-1681x ("FCRA"), as allowing an uninjured consumer to recover statutory damages from any consumer reporting agency that has "willfully fail[ed] to comply" with its FCRA reporting duties. 15 U.S.C. § 1681n(a)(1)(A).[3] In

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> *Controversies* between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. Const. art. III, § 2 (emphasis added).

[3] Section 1681n(a)(1)(A) of the FCRA provides, in relevant part:

> Any person who willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to . any actual damages or damages of not less than $100 and not more than $1,000. . . .

15 U.S.C. § 1681n(a)(1)(A). Section 1681n(a)(2), in turn, allows the prevailing plaintiff to seek punitive damages, and § 1681n(a)(3) awards the prevailing plaintiff costs and reasonable attorney's fees.

particular, the lower court held that the respondent, Thomas Robins, alleged an injury in fact because the FCRA "does not require a showing of actual harm when a plaintiff sues for willful violations." *Robins*, 742 F. 3d at 412. Nor has Robins alleged any such cognizable injury in his putative class complaint.[4]

In so interpreting the FCRA, the Ninth Circuit conflated a statutory violation, or "injury in law," with injury in fact. The lower court erred, and the case should be dismissed for lack of subject matter jurisdiction.

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[4] Robins alleges that the petitioner, Spokeo, Inc., a website operator, has transmitted false (yet favorable) personal information about him on its website, primarily by overstating his educational level and his financial status. *See Robins v. Spokeo, Inc.*, 742 F. 3d 409, 411 (9th Cir. 2014). Robins also alleges that Spokeo's transmittal of this information has harmed his employment prospects and has caused him anxiety. *See id.* The Ninth Circuit did not to reach these allegations of purported harm because it concluded that Robins had established an injury in fact merely by alleging a violation of his rights under the FCRA. *See Robins*, 742 F. 3d at 414 n.3.

Nevertheless, it should be noted that these allegations cannot establish an injury in fact because they are impermissibly speculative and subjective. In particular, they "rel[y] on a highly attenuated chain of possibilities" that is based on "speculation about the decisions of independent actors[,]" such as prospective employers. *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1148, 1150 (2013). As such, these allegations "do[] not satisfy the [Article III] requirement that threatened injury must be *certainly impending* to constitute injury in fact." *Id.*, 133 S. Ct. at 1147 (citation and internal quotation marks omitted) (emphasis in original).

A. A Breach Of Statutory Duties Is Not An Injury In Fact Under Article III Unless The Breach Has Caused The Plaintiff To Suffer A Concrete, *De Facto* Harm.

The violation of a statutory right, willful or otherwise, is not itself an injury in fact under Article III. Instead, Article III requires the plaintiff to plead and prove an "*injury-in-fact caused by the violation of [a] legal right.*" *Lewis v. Casey*, 518 U.S. 343, 353, n.4 (1996) (emphasis in original). The plaintiff must show that the defendant's breach of its statutory duties has made the plaintiff worse off in some concrete, identifiable way. *See* Michael E. Rosman, *Standing Alone under the Fair Housing Act*, 60 Mo. L. Rev. 547, 566 (1995) (discussing same).

Nor can Congress *manufacture* an injury in fact, as the Ninth Circuit apparently concluded, by providing a private damages remedy for the mere breach of statutory duties. "It is settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing " *Raines v. Byrd*, 521 U.S. 811, 820 (1997). *See also Summers v. Earth Island Inst.*, 555 U.S. 488, 497 (2009) ("[T]he requirement of injury in fact is a hard floor of Article III jurisdiction that *cannot be removed by statute.*") (emphasis added).

Accordingly, Article III limits Congress to providing a private damages remedy that gives legal recognition to an actual harm. "Congress[] [may]

elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law . . ." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 578 (1992). Such actual harm must exist in the real world and, therefore, "has nothing to do with the text of the statute relied upon." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 97 (1998).

To satisfy Article III, then, "Congress must at the very least *identify the injury* it seeks to vindicate [and] the party bringing suit must show that the [challenged conduct] *injures him in a concrete and personal way*." *Lujan*, 504 U.S. at 580-81 (Kennedy, J., concurring) (emphasis added). Consistent with this test for Article III standing, the FCRA should be interpreted as requiring an injury in fact. After all, "[i]t is our settled policy to avoid an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question." *Gomez v. United States*, 490 U.S. 858, 864 (1989).

Accordingly, the availability of statutory damages in lieu of actual damages under the FCRA should be interpreted as simply aiding the injured plaintiff who cannot quantify his actual harm or who has suffered a minimal quantifiable harm--i.e., a harm of less than $100.[5] *See, e.g., F.W. Woolworth Co. v. Contemporary Arts, Inc.*, 344 U.S. 228, 231 (1952) ("[Statutory damages under the Copyright Act] give the owner of a copyright some *recompense for injury done him*, in a case where the rules of law

[5] *See* n.3, above, for the relevant language of the FCRA.

render difficult or impossible proof of damages or discovery of profits.") (citation and internal quotation marks omitted) (emphasis added).

Under this interpretation, then, the Ninth Circuit has erroneously eliminated the injury-in-fact requirement from the FCRA. And Robins, in turn, has alleged neither statutory nor constitutional standing to proceed with his FCRA claim.[6] Therefore, his complaint should be dismissed for lack of subject matter jurisdiction.

B. The Ninth Circuit Conflated "Injury In Law" With Injury In Fact When It Misinterpreted This Court's Key Precedent On The Issue.

In reaching its decision, the Ninth Circuit erroneously conflated an "injury in law," or statutory standing, with an injury in fact, the "irreducible constitutional minimum of standing" under Article III. *Lexmark*, 134 S. Ct. at 1386 (citation and internal quotation marks omitted). According to the Ninth Circuit, "the violation of a statutory right is usually a sufficient injury in fact to confer standing." *Robins*, 742 F. 3d at 412. In the Ninth Circuit's view, then, a breach of statutory duties is itself an injury in fact. That is, an uninjured plaintiff would generally have Article III standing to enforce a statutory right whenever Congress says he does, and a court should defer to Congress's policy choice. *See id.*, 742 F. 3d at 413.

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[6] *See* n.4, above.

In so deciding, the Ninth Circuit all but eliminated the injury-in-fact requirement under Article III. If the Ninth Circuit were correct, there would be no limits to Congress's expansion of the Federal Judiciary's jurisdiction, other than Congress's broad plenary powers to legislate under Article I, § 8. Such a result would contravene this Court's oft-repeated statement that injury in fact is a "hard floor" jurisdictional requirement of Article III that Congress can neither eliminate nor manufacture. *See Summers*, 555 U.S. at 497; *Citizens for a Better Env't*, 523 U.S. at 97; *Raines*, 521 U.S. at 820; *Lewis*, 518 U.S. at 353 n.4.

In particular, the Ninth Circuit's decision rests on a misinterpretation of two key precedents of this Court discussing Article III standing. First, the lower court misconstrued language from *Warth v. Seldin*, 422 U.S. 490 (1975), in which the Court stated that "[t]he actual or threatened injury required by Art[icle] III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing." *Robins*, 742 F. 3d at 412 (quoting *Warth*, 422 U.S. at 500) (citations and internal quotation marks omitted). *See also Robins*, 742 F. 3d at 412 (citing *Edwards v. First Am. Corp.*, 610 F. 3d 514, 517 (9th Cir. 2010), *cert. granted*, 131 S. Ct. 3022 (2011), *cert. dismissed as improvidently granted*, 132 S. Ct. 2536 (2012) (discussing *Warth*)).

The Ninth Circuit misinterpreted this language from *Warth* to mean that a mere breach of statutory duties establishes an injury in fact under Article III. Therefore, the lower court concluded, Congress is free to create a private damages remedy

for such breach. *See Robins*, 742 F. 3d at 412 (citing *Edwards*, 610 F. 3d at 517).

Warth says no such thing. As this Court subsequently explained in *Lujan*, the "invasion of rights" language from *Warth* means that a claim for breach of statutory duties *may* satisfy Article III standing, but only when the breach has caused the plaintiff to suffer a concrete, *de facto* harm. *See Lujan*, 504 U.S. at 578 (Article III permits "Congress [to] elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law "). *See also id.* (discussing Court precedent illustrating Article III requirement that statutory violation must cause plaintiff actual harm).

But the Ninth Circuit compounded its error by misinterpreting this very explanation of *Warth* that the Court provided in *Lujan*. The lower court misread the "concrete, *de facto* harm" discussed in *Lujan* as merely requiring the plaintiff to establish the violation of a personal statutory right, as opposed to a statutory right belonging to the general public. *See Robins*, 742 F. 3d at 413. According to the Ninth Circuit, then, Article III is satisfied once the plaintiff has established the violation of such a personal statutory right.

This is an incomplete statement of the law of standing. While Article III does indeed require the violation of a personal right, it also requires the plaintiff to show that such violation caused him actual harm. *See Lewis*, 518 U.S. at 353 n.4; *Lujan*, 504 U.S. at 578. Therefore, the mere violation of a personal statutory right, without any ensuing harm

to the plaintiff, is not a case or controversy under Article III.

In sum, the Ninth Circuit virtually abrogated the injury-in-fact requirement under Article III when it misinterpreted both *Warth* and *Lujan*. The lower court's decision should therefore be reversed.

C. By Conflating Injury In Law With Injury In Fact, The Ninth Circuit Abdicated The Judiciary's Duty, Under *Marbury v. Madison*, To Decide Whether A Federal Statutory Claim Comports With Article III.

By conflating injury in law with injury in fact, the Ninth Circuit abdicated the Federal Judiciary's duty to determine whether a federal statutory claim comports with Article III. *See Marbury v. Madison*, 1 Cranch 137, 177, 2 L. Ed. 60 (1803) (invalidating federal statute conferring original jurisdiction on the Court over subject matter not authorized by Article III--i.e., issuance of writ of mandamus to compel public officer to deliver Presidential commission). "The federal courts are under an independent obligation to examine their own jurisdiction, and standing is perhaps the most important of the jurisdictional doctrines." *Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1276 (2015) (Scalia, J., dissenting) (quoting *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 230–31 (1990)) (internal punctuation marks omitted).

As amici have argued above, the Ninth Circuit's decision would, in effect, allow *Congress*, in

the exercise of its plenary Article I powers, to decide what is a case or controversy under Article III. Simply put, if the lower court's decision were allowed to stand, Article III's jurisdictional limits would be no more. "[I]f Congress creates a legal right the violation of which will meet the injury 'in fact' requirement, it can indeed abrogate the Article III minima because the Court will not examine the factual existence of an 'injury' beyond the violation of a legal right." Rosman, *Standing Alone*, 60 Mo. L. Rev. at 578 (internal quotation marks omitted).

In its decision, then, the Ninth Circuit abandoned the Federal Judiciary's unique responsibility to preserve its own jurisdictional limits under Article III and to hold Congress accountable to those limits:

> The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written [as] the fundamental and paramount law of the nation. It is emphatically the *province and duty of the judicial department to say what the law is.* This is of the very essence of judicial duty. [I]f the legislature shall do what is expressly forbidden [by the Constitution], [i]t would be giving to the legislature a practical and real omnipotence .

Marbury, 1 Cranch at 176-78 (emphasis added).

In short, the lower court's decision should be reversed to uphold the Federal Judiciary's exclusive power and duty to decide whether a federal statutory claim is indeed a case or controversy under Article III. "[T]here is an outer limit to the power of Congress to confer rights of action[, which] is a direct and necessary consequence of the case and controversy limitations found in Article III." *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring).

II. BY ALLOWING AN UNINJURED PLAINTIFF TO PROCEED WITH HIS CLAIM FOR THE BARE VIOLATION OF STATUTORY DUTIES, THE NINTH CIRCUIT INTRUDED UPON THE EXCLUSIVE POWER OF THE EXECUTIVE BRANCH TO ENFORCE THE LAW, IN VIOLATION OF THE SEPARATION OF POWERS.

It is clear, then, that the Ninth Circuit has interpreted the FCRA to allow an uninjured plaintiff such as Robins to recover damages in federal court. In so deciding, the lower court certainly exceeded its subject matter jurisdiction under Article III. But the Ninth Circuit also intruded upon the exclusive and discretionary role of the Executive Branch to "take Care that the Laws be faithfully executed " U.S. Const. art. II, § 3.

In particular, the lower court, acting with purported congressional approval, allowed Robins, an uninjured plaintiff (and putative representative of a class of similarly uninjured individuals), to proceed in federal court as if he were an agent of the Executive Branch, seeking to enforce Spokeo's

general FCRA duties owed to consumers. Stated otherwise, the Ninth Circuit offended the separation of powers--the system of checks and balances among the three branches of federal government that is a cornerstone of the Court's Article III jurisprudence. "The law of Article III standing is built on separation-of-powers principles [and] serves to prevent the judicial process from being used to usurp the powers of the political branches." *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1146 (2013). *See also DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006) ("This Court has recognized that the case-or-controversy limitation is crucial in maintaining the tripartite allocation of power set forth in the Constitution.") (citation and internal quotation marks omitted); *Raines*, 521 U.S. at 820 ("[T]he law of Article III standing is built on a single basic idea--the idea of separation of powers[--] th[e] overriding and time-honored concern about keeping the Judiciary's power within its proper constitutional sphere .") (citation and internal quotation marks omitted); Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U. L. Rev. 881, 897-98 (1983) ("[S]tanding and separation of powers are intimately related. And the essential element that links the two [is] the requirement of *distinctive* injury not shared by the entire body politic .") (emphasis in original).

And so, the separation of powers is offended in two ways here. First, the Ninth Circuit exceeded its proper role under Article III to decide a live dispute involving a party who has suffered, or is likely to suffer, a concrete harm. *See Steel Co.*, 523 U.S. 83,

102 n.4 (1998) ("The courts must stay within their constitutionally prescribed sphere of action, whether or not exceeding that sphere will harm one of the other two branches."). And second, the lower court encroached upon the exclusive and discretionary law-enforcement powers of the Executive Branch under Article II. *See id.*, 523 U.S. at 102 n.4 (discussing "the more specific separation-of-powers concern" that a statutory claim may "interfere[] with the Executive's power to 'take Care that the Laws be faithfully executed,' Art. II, § 3 ") (citation and internal quotation marks omitted).

In short, the lower court allowed an uninjured plaintiff to vindicate the public's interest in ensuring compliance with the FCRA. However, "[v]indicating the *public* interest is the function of Congress and the Chief Executive[,]" and *not* the Judiciary. *Lujan*, 504 U.S. at 576 (emphasis in original). *See also* Craig A. Stern, *Another Sign from Hein: Does the Generalized Grievance Fail a Constitutional or a Prudential Test of Federal Standing to Sue?*, 12 Lewis & Clark L. Rev. 1169, 1193 (2008) ("Article II forbids private exercise of federal executive power as much as judicial exercise of federal executive power. If an *uninjured plaintiff* were to bring an action that rightfully must be brought only by the executive power, the court would be countenancing a violation of Article II.") (emphasis added).

To be sure, the Judiciary's proper exercise of its powers under Article III does entail the enforcement of statutory duties. But such enforcement is only incidental and necessary to providing the injured party with a remedy for a

concrete harm. "[C]ourts are permitted to interfere in executive processes only to the extent necessary to vindicate individual rights but no more." James Leonard & Joanne C. Brant, *The Half-Open Door: Article III, the Injury-in-Fact Rule, and the Framers' Plan for Federal Courts of Limited Jurisdiction*, 54 Rutgers L. Rev. 1, 85 (2001) (discussing *Marbury*). In this case, however, the Ninth Circuit enforced an *uninjured* party's statutory rights. In so doing, the lower court assumed the exclusive role of the Executive Branch to enforce the law. *See Lujan*, 504 U.S. at 576.[7]

In sum, injury in fact is the irreducible constitutional minimum for the exercise of federal jurisdiction over a statutory claim. A plaintiff simply has no Article III standing to sue in federal court unless he alleges and proves that the defendant's violation of his statutory rights has caused him actual harm. Notwithstanding this bedrock constitutional requirement, the Ninth

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[7] In this connection, it should be noted that the FCRA provides for broad administrative enforcement of the statute, at both the federal and state levels. For example, the Federal Trade Commission ("FTC") is empowered to investigate and enforce the FCRA, and to seek civil penalties against the infringing business. 15 U.S.C. § 1681s(a)(1), (a)(2)(A)-(B). Moreover, other federal agencies are authorized to enforce the FCRA. 15 U.S.C. § 1681s(b)(1). The FCRA also provides that any violation of a consumer's rights thereunder shall constitute an unfair or deceptive act or practice in commerce, in violation of the Federal Trade Commission Act, 15 U.S.C. § 45(a), and is enforceable by the FTC under that statute. 15 U.S.C. § 1681s(a)(1). Finally, the FCRA authorizes a state's law enforcement agencies to investigate and enforce consumers' FCRA rights, and to obtain injunctive and monetary relief in state or federal court. 15 U.S.C. § 1681s(c)(1)(A), (c)(1)(B)(i).

Circuit has interpreted the FCRA as allowing an uninjured plaintiff such as Robins to sue in federal court. Therefore, his complaint should be dismissed for lack of subject matter jurisdiction.

CONCLUSION

For the reasons stated above, amici respectfully request that the judgment of the Ninth Circuit be reversed.

Respectfully submitted,

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REPLY BRIEF

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No. 13-1339

In the
Supreme Court of the United States

SPOKEO, INC.,

Petitioner,

v.

THOMAS ROBINS, individually and
on behalf of all others similarly situated,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether Congress may confer Article III standing upon a plaintiff who suffers no concrete harm, and who therefore could not otherwise invoke the jurisdiction of a federal court, by authorizing a private right of action based on a bare violation of a federal statute.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
INTEREST OF AMICUS CURIAE	1
INTRODUCTION AND SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. CONGRESS CANNOT CREATE INJURY-FREE ARTICLE III STANDING VIA STATUTE WHERE IT OTHERWISE DOES NOT EXIST	3
II. PLAINTIFFS WITHOUT INJURY LACK STANDING TO PURSUE A CLASS ACTION	10
A. "Representative" Plaintiffs Must Have Suffered the Same Injury as the Class They Seek To Represent	11
B. "Noninjury" Class Actions Are Ripe for Abuse Because They Are Conducted for the Benefit of Lawyers, Not Any Individually Harmed Person	13
CONCLUSION	20

TABLE OF AUTHORITIES

	Page
Cases	
Aetna Life Ins. Co. of Hartford, Conn. v. Haworth, 300 U.S. 227 (1937)	9
Allee v. Medrano, 416 U.S. 802 (1974)	5
Allen v. Wright, 468 U.S. 737 (1984)	3
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TABLE OF AUTHORITIES—Continued

	Page
DaimlerChrysler Corp. v. Inman, 252 S.W.3d 299 (Tex. 2008)	18
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TABLE OF AUTHORITIES—Continued

	Page
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TABLE OF AUTHORITIES—Continued

	Page
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Robins v. Spokeo, Inc., 742 F.3d 409 (9th Cir. 2014)	2
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TABLE OF AUTHORITIES—Continued

	Page
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Constitution	
U.S. Const. art. II, § 3, cl. 4	3

TABLE OF AUTHORITIES—Continued

Page

Rules

Fed. R. Civ. P 23 5, 10, 11, 18

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R. 37.3(a) 1

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Page

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Page

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INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation respectfully submits this brief amicus curiae in support of Petitioner, Spokeo, Inc.[1] Pacific Legal Foundation (PLF) was founded in 1973 and is widely recognized as the most experienced nonprofit legal foundation of its kind. PLF litigates matters affecting the public interest at all levels of state and federal courts and represents the views of thousands of supporters nationwide. PLF advocates for limited government, individual rights, and free enterprise. PLF has litigated numerous cases involving Article III standing, *see, e.g.*, *First American Financial Corp. v. Edwards*, 132 S. Ct. 2536 (2012); *Summers v. Earth Island Institute*, 555 U.S. 488 (2009); *Massachusetts v. E.P.A.*, 549 U.S. 497 (2007); *Bennett v. Spear*, 520 U.S. 154 (1997); *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), as well as cases involving the abuse of class action lawsuits for private gain under the guise of public protections, including *Harris v. Mexican Specialty Foods, Inc.* 564 F.3d 1301 (11th Cir. 2009), and *Soualian v. Int'l Coffee & Tea*, No. 07-56377 (9th Cir., *appeal dismissed*, Sept. 16, 2008).

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

Spokeo Inc., runs a website that collects and publishes information about individuals. Thomas Robins, an unemployed man, sued Spokeo for willful violations of the Fair Credit Reporting Act, alleging that Spokeo published false information, such as Robins was married, had a graduate degree, and was wealthy. The Ninth Circuit held that Robins' allegation that Spokeo "willfully" violated the Fair Credit Reporting Act (FCRA) by retransmitting inaccurate personal information was sufficient for Article III standing. The court collapsed the three-part standing inquiry—injury, causation, and redressability—into a single question of whether the plaintiff properly alleged a statutory violation. *Robins v. Spokeo, Inc.*, 742 F.3d 409, 412, 414 (9th Cir. 2014).

Article III permits federal courts to hear only "cases or controversies," defined as cases brought by plaintiffs who have suffered actual (not speculative) harm that can be redressed by court action. Article III provides the outside limit on Congress's authority to grant standing. Absent some injury caused by the statutory violation, plaintiffs lack standing to proceed in federal court. The standing issue presented in this case gains extra importance because the named plaintiff seeks to represent a class. The class action overlay adds complex procedural and policy concerns that impact not only the named parties, but all nonparties similarly situated who would be bound by the case resolution. *Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2380 (2011). The requirement that a litigant fulfill the injury, causation, and redressability elements of standing recognizes that courts are not

super-legislatures deciding broad questions of policy but rather tribunals best equipped to resolve individual disputes and clearly defined questions of law and fact.

The decision below should be reversed.

ARGUMENT

I

CONGRESS CANNOT CREATE INJURY-FREE ARTICLE III STANDING VIA STATUTE WHERE IT OTHERWISE DOES NOT EXIST

The text of Article III gives the federal courts authority to hear only "Cases" and "Controversies" and serves to maintain the constitutional balance between the branches. Indeed, standing "is built on a single basic idea—the idea of separation of powers." *Allen v. Wright*, 468 U.S. 737, 752 (1984); *Clapper v. Amnesty Int'l. USA*, 133 S. Ct. 1138, 1146 (2013) (Article III standing prevents "the judicial process from being used to usurp the powers of the political branches"). Specifically, courts do not impinge upon the Executive's duties to "take Care that the Laws be faithfully executed" under Article II. U.S. Const. art. II, § 3, cl. 4 (Take Care Clause). *See also* Lisa Schultz Bressman, *Judicial Review of Agency Inaction: An Arbitrariness Approach*, 79 N.Y.U. L. Rev. 1657, 1684 (2004); Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U. L. Rev. 881, 881 (1983).

The "Take Care" Clause reflects a structure that does not permit Congress to use citizen suits and other private enforcement actions to conscript the courts in

its battles with the Executive, which would result in an imbalance among the branches. Heather Elliott, *The Functions of Standing*, 61 Stan. L. Rev. 459, 492-500 (2008). Suits against private entities for violations of the law particularly raise "a lurking issue about private interference with the exercise of prosecutorial discretion, and hence with the President's 'Take Care' power." Cass R. Sunstein, *What's Standing After* Lujan? *Of Citizen Suits, "Injuries," and Article III*, 91 Mich. L. Rev. 163, 231 n.300 (1992).

The constitutional structure also reflects the fact that courts—lacking independent fact-finding ability—are well equipped to handle actual disputes between adverse parties, but are poorly equipped to handle theoretical disputes. *See* Robert P. Taylor, *Antitrust Standing: Its Growing—Or More Accurately Its Shrinking—Dimensions*, 55 Antitrust L.J. 515, 518 (1986) (noting that "the judicial process is poorly equipped to deal with highly speculative claims of injury"); Richard M. Re, *Relative Standing*, 102 Geo. L.J. 1191, 1232 (2014) ("Unfettered authority to confer standing would empower the political branches to compel adjudication of controversies that are, as presented, poorly suited to judicial resolution."). Put simply, "courts should not make unnecessary decisions, because unnecessary decisions are often bad decisions." Jeremy Gaston, *Standing on Its Head: The Problem of Future Claimants in Mass Tort Class Actions*, 77 Tex. L. Rev. 215, 221 (1998). Rather, courts, "at their best," are "councils of wise elders meditating on real disputes." Richard A. Posner, *The Problematics of Moral and Legal Theory* 257-58 (1999). The standing requirement assures "that the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a

concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982). Deciding cases in "an actual factual setting" ensures that a court's decisions "will not pave the way for lawsuits which have some, but not all, of the facts of the case actually decided by the court." *Id.*

Requiring an actual, concrete injury for a private plaintiff to have standing to sue serves both prudential and constitutional policies. *See* Erwin Chemerinsky, *Constitutional Law: Principles and Policies* 50-51 (2d ed. 2002) (describing policies of conserving judicial resources, optimizing judicial decisionmaking, and promoting fairness as underlying the justiciability doctrines, including standing). This Court has emphasized that parties who have suffered an actual injury-in-fact test present concrete issues more amenable to concrete resolution. *See United Pub. Workers of Am. v. Mitchell*, 330 U.S. 75, 89-90 (1947) (identifying " 'concrete legal issues, not abstractions'" as requisite for constitutional litigation and expressing concern regarding the lack of specific facts about which of plaintiff's activities the challenged Hatch Act prohibited (quoting *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 423 (1940))); *Aetna Life Ins. Co. of Hartford, Conn. v. Haworth*, 300 U.S. 227, 240-41 (1937) (describing a "justiciable controversy" as a controversy satisfying requirement for a concrete dispute touching a legal relationship between parties).

These constitutional and prudential concerns were at the forefront of the analysis in *Lujan*, 504 U.S. 555, which outlined the essence of current standing

doctrine. To have standing, a plaintiff must claim to have suffered an injury-in-fact caused by the defendant, that is redressable by some court action. *Id.* at 560-61. The injury must be "concrete and particularized," and "actual or imminent, not 'conjectural' or 'hypothetical.'" *Id.* (citations omitted). For causation, the injury must be " 'fairly trace[able] to the challenged action of the defendant.'" *Id.* at 560 (brackets in original; citation omitted). In terms of redressability, the requested relief must be reasonably capable of redressing the injury rather than "speculative." *Id.* at 561 (citation omitted). *See also Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014) (reaffirming *Lujan* elements of Article III standing); *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2661 (2013) ("For a federal court to have authority under the Constitution to settle a dispute, the party before it must seek a remedy for a personal and tangible harm."); *Amnesty Int'l.*, 133 S. Ct. at 1143 ("Respondents cannot manufacture standing by choosing to make expenditures based on hypothetical future harm that is not certainly impending.").

Congress can, by statute, require the federal courts to abandon *prudential* standing requirements. *See, e.g., Bennett*, 520 U.S. at 163 ("Congress legislates against the background of our prudential standing doctrine, which applies unless it is expressly negated."). And Congress may create rights, the deprivation of which gives rise to a cognizable Article III injury. *Warth v. Seldin*, 422 U.S. 490, 500 (1975). However, these cases and their progeny do not alter Article III's outside limit on Congress's authority to confer standing. *See Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979) (While Congress could eliminate prudential barriers to expand standing

to sue under the Fair Housing Act to the full extent permitted by Article III, "[i]n no event may Congress abrogate the Article III minima.") (citing *Warth*, 422 U.S. at 501, and *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38 (1976)); *Mahon v. Ticor Title Ins. Co.*, 683 F.3d 59, 63 (2d Cir. 2012) (same); *Ass'n of Cmty. Orgs for Reform Now v. Fowler*, 178 F.3d 350, 365 (5th Cir. 1999) (because statute eliminated prudential standing requirements, plaintiff organization needed "only to satisfy the standing requirements arising under Article III."); *Am. Immigration Lawyers Ass'n v. Reno*, 199 F.3d 1352, 1364 (D.C. Cir. 2000) ("Congress may relax the prudential standing rules the judiciary has created . in the exercise of its Article I power, so long as it keeps within the limits of Article III."). *Cf. Thompson v. N. Am. Stainless, LP*, 562 U.S. 170, 176 (2011) (declining to interpret Title VII's grant of a private cause of action to any "aggrieved person" as conferring standing coextensive with Article III where such an expansive grant of standing would lead to "absurd consequences").

> Whether the courts were to act on their own, or at the invitation of Congress, in ignoring the concrete injury requirement described in our cases, they would be discarding a principle fundamental to the separate and distinct constitutional role of the Third Branch—one of the essential elements that identifies those "Cases" and "Controversies" that are the business of the courts rather than of the political branches.

Lujan, 504 U.S. at 576. That is, a plaintiff's claim that a defendant failed to follow the law—without more—is

insufficient to satisfy Article III. *See also Sierra Club v. Morton*, 405 U.S. 727, 740 n.16 (1972) ("[J]udicial review is effective largely because it is not available simply at the behest of a partisan faction, but is exercised only to remedy a particular, concrete injury.").

This point was further firmly established as part of constitutional standing doctrine in *Raines v. Byrd*, 521 U.S. 811, 820 n.3 (1997), holding that "it is settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing." *See also Summers*, 555 U.S. at 497 (rejecting environmentalist groups' efforts to challenge revised procedures the U.S. Forest Service adopted to streamline timber removal on small parcels affected by forest fires because "the requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute"); *Wallace v. ConAgra Foods, Inc.*, 747 F.3d 1025, 1032 (8th Cir. 2014) (Congress's ability to "creat[e] legal rights, the invasion of which creates standing remains firmly circumscribed by Article III itself.") (citations omitted); *Consumer Watchdog v. Wisconsin Alumni Research Found.*, 753 F.3d 1258, 1261-62 (Fed. Cir. 2014) (no Article III standing where sharp disagreement with agency action involved no invasion of the plaintiff's legal rights and no particularized concrete stake in the outcome).

Harmonizing the approaches of both the statutory and constitutional cases, Professor Heather Elliott concludes, "Congress can only identify injuries that the Court would agree are concrete and can only elevate to de jure status injuries that the Court would already recognize as de facto." Heather Elliott, *Congress's*

Inability To Solve Standing Problems, 91 B.U. L. Rev. 159, 187 (2011). She explains two inter-related reasons for this limitation on Congress. First, it is unclear whether a statute that "deems" a person to have standing is a *factual* finding of the sort typically granted deference by the courts. Second, even if a pronouncement of standing is considered to be a factual one, courts give only limited deference to congressional fact-finding when it comes to matters implicating constitutional structure. *See* William D. Araiza, *Deference to Congressional Fact-Finding in Rights-Enforcing and Rights-Limiting Legislation*, 88 N.Y.U. L. Rev. 878, 902 (2013) ("[T]he Court's hesitance to defer to congressional fact-finding in some federalism doctrines reflects the Court's suspicion that Congress cannot be trusted to be a faithful guardian of the federal-state balance."). Thus, in *United States v. Morrison*, 529 U.S. 598, 614 (2000), for example, this Court rejected congressional fact-finding that purported to demonstrate that gender violence had a nontrivial effect on interstate commerce: "Simply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so." *Id.* (alterations, citations, and internal quotation marks omitted). *See also Gonzales v. Carhart*, 550 U.S. 124, 165 (2007) ("The Court retains an independent constitutional duty to review factual findings where constitutional rights are at stake.").

Because "it is the Court's special responsibility to mark where Congress has exceeded its constitutional bounds," Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 Ind. L.J. 1 (2003), to the extent Congress can confer standing on

a plaintiff, it is limited to "tinker[ing] at the edges," of prudential standing. Jonathan H. Adler, *Standing Still in the Roberts Court*, 59 Case W. Res. L. Rev. 1061, 1063 (2009); *Bennett*, 520 U.S. at 163 (finding plaintiffs had standing under "zone of interests" prudential standing doctrine due to congressional authorization of suit by "any person"). A statute may not "confer" Article III standing on a private person to sue a private defendant for regulatory errors that caused no injury beyond violation of the statute or regulation itself. "To the extent that the federal courts coercively impact the lives of citizens in a manner not incident to the resolution of live disputes, they have exceeded their legitimate role in a democratic society and seriously undermined our constitutionally dictated system of separation of powers." Martin H. Redish and Sopan Joshi, *Litigating Article III Standing: A Proposed Solution to the Serious (But Unrecognized) Separation of Powers Problem*, 162 U. Pa. L. Rev. 1373, 1377-78 (2014).

II

PLAINTIFFS WITHOUT INJURY LACK STANDING TO PURSUE A CLASS ACTION

The standing issue presented in this case gains extra importance because Thomas Robins seeks to represent a class. The class action overlay adds complex procedural and policy concerns that affect not only Robins as the named party, but all nonparties similarly situated who would be bound by the case resolution. *Smith*, 131 S. Ct. at 2380 ("Neither a proposed class action nor a rejected class action may bind nonparties. What does have this effect is a class action approved under Rule 23."). In short, class

actions are "a special kind of litigation," *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 470 (1978), in which the standing of the named plaintiff assumes even greater importance.

A. "Representative" Plaintiffs Must Have Suffered the Same Injury as the Class They Seek To Represent

Adjudicating the rights of third parties in their absence without some compelling need is unfair, both to present and future litigants. *See, e.g., Warth*, 422 U.S. at 509-10 (denying third party standing when no special relationship existed between the litigants and the third parties and a denial of standing would not harm the third parties); Gaston, 77 Tex. L. Rev. at 258 ("Standing is about letting the presently affected litigate their adversarial claims, not about binding the countless and unaware to the decisions of lawyers who have only their self-interest at stake."). Thus, class representatives must actually be members of the class. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2550 (2011) (To satisfy standing, the class representative must suffer an injury and must have the "same interest" and the "same injury" as the class members.); *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974) ("[I]f none of the named plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class."); *Bailey v. Patterson*, 369 U.S. 31, 32-33 (1962) (rejecting a class claim, holding that plaintiffs "cannot represent a class of whom they are not a part").

The representative plaintiffs cannot use the procedural requirements of Federal Rule of Civil Procedure 23 to create standing if it otherwise does not

exist. *See Allee v. Medrano*, 416 U.S. 802, 828-29 (1974) ("[A] named plaintiff cannot acquire standing to sue by bringing his action on behalf of others who suffered injury which would have afforded them standing had they been named plaintiffs; it bears repeating that a person cannot predicate standing on injury which he does not share. Standing cannot be acquired through the back door of a class action.") (Burger, C.J., concurring in the result in part and dissenting in part). That is, Robins cannot assert that *other people* may have been actually harmed by Spokeo's alleged publication of false information, if he cannot identify any concrete harm to his own legal interests. *See also Weiner v. Bank of King of Prussia*, 358 F. Supp. 684, 690, 694-95 (E.D. Pa. 1973) ("[A] procedural rule cannot supply a necessary substantive element" and thereby confer standing upon the plaintiff.). "Standing is one of the keys necessary to open the door to the federal courthouse. Rule 23 merely provides a procedural doorstop which holds the door open for qualified class members, once it has been opened by the person or persons initially seeking entry." *Matte v. Sunshine Mobile Homes, Inc.*, 270 F. Supp. 2d 805, 826 (W.D. La. 2003) (citation omitted). This has not been a controversial principle; both federal and state courts (relying on federal law as persuasive authority) have long demanded standing from lead plaintiffs in class actions.[2] This Court

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[2] *See Fernandez v. Takata Seat Belts, Inc.*, 210 Ariz. 138, 141 (2005) (plaintiff who cannot state an individual claim for lack of injury has no standing to represent a class of potentially injured plaintiffs); *M.D. Anderson Cancer Ctr. v. Novak*, 52 S.W.3d 704, 707-78 (Tex. 2001) (without actual injury, plaintiff had no standing to bring class action); *Landesman v. General Motors Corp.*, 377 N.E.2d 813, 815 (Ill. 1978) (where the plaintiff has no

(continued...)

should not abandon a strong standing requirement and replace it with an open-ended theory permitting people who offer only speculative theories of harm to sue in the name of others who may (or may not) be able to allege such harm.

B. "Noninjury" Class Actions Are Ripe for Abuse Because They Are Conducted for the Benefit of Lawyers, Not Any Individually Harmed Person

Permitting a noninjury claim to move forward invites abuse of the class action procedure. Even under the best circumstances, most class actions proceed under the leadership of lawyers who have never entered into contractual representation—or even met—the vast majority of the class members whom

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[2] (...continued)
individual cause of action, it necessarily follows that any attempted class action must also fail); *Kid's Care, Inc. v. Alabama Dep't of Human Resources*, 843 So. 2d 164, 167 (Ala. 2002) (if named plaintiff has not been injured by wrong alleged in complaint, then no case or controversy is presented and plaintiff has no standing to sue either on his own behalf or on behalf of a class); *Hamilton v. Ohio Sav. Bank*, 694 N.E.2d 442, 450 (Ohio 1998) (to have standing to sue as a class representative, the plaintiff must possess the same interest and suffer the same injury shared by all members of the class that he seeks to represent); *Savannah R-III School Dist. v. Public School Retirement System of Mo.*, 950 S.W.2d 854, 857-58 (Mo. 1997) (named plaintiffs who represent class must allege and show that they personally have been injured, not that injury has been suffered by other members of class which they purportedly represent); *Vignaroli v. Blue Cross of Iowa*, 360 N.W.2d 741, 746 (Iowa 1985) (while class membership is not expressly required by the Iowa class actions rule, it is implicit in that rule that class representative be class member); *Doe v. Governor*, 412 N.E.2d 325, 327 (Mass. 1980) (if the individual plaintiffs may not maintain the action on their own behalf, they may not seek relief on behalf of class).

they purport to represent. The "class representative" whose claims are supposed to typify those of absent class members usually is a figurehead who exercises little, if any, meaningful supervision over the litigation. As a practical matter, the class counsel themselves serve as agents for the class. Richard A. Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 Colum. L. Rev. 149, 150-51 (2003).

Class members need an increased level of judicial protection because they are not there to defend themselves. Their only chance to avoid unfair practices by a "representative" who is not a member of the class is to opt-out, and it is hardly fair to place the "risk and burden on the essentially innocent party who happens to have the least information." Gaston, 77 Tex. L. Rev. at 244. Because the class action binds these absent and informationally-impoverished "litigants," due process requires a class representative both capable of and willing to act in the interest of all the members of the class. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985) (opining that "the Due Process Clause . . . requires that the named plaintiff at all times adequately represent the interests of the absent class members"). Careful consideration of the needs of absent class members benefits courts as well, because without adequate representation, any judgment obtained through the class action becomes subject to collateral attack. *See id.*; *Youngman v. Tahmoush*, 457 A.2d 376, 379 (Del. Ch. 1983) (an adequate representative is one who is "qualified to serve in a fiduciary capacity as a representative of a class, whose interest is dependent upon the representative's adequate and fair prosecution."); *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Products*

Liab. Litig., 55 F.3d 768, 784 (3d Cir.), *cert. denied*, 516 U.S. 824 (1995).

Denying representative status to uninjured, non-class members is the only way to protect the interests of the class members. "Foremost, they do not get 'sold down the river' by having their future claims devalued and decided before they even accrue." Gaston, 77 Tex. L. Rev. at 237. For "it is not obvious that the settling of future plaintiffs' claims—essentially without their knowledge—is desirable, necessary, or worthwhile to anyone except the defendants and possibly the current claimants." *Id.* at 238. Lawsuits holding the potential only for a small recovery for each class member, such as this one, are particularly susceptible to abuse:

> The plaintiffs' potential recoveries in a small claimant case are, by definition, minimal. Even if the case succeeds, the plaintiff and class members will receive a minute sum. By contrast, the plaintiffs' attorneys, whose fee is determined by reference to the aggregate amount of the recovery, stand to gain immense financial rewards. Consequently, plaintiffs have little incentive to participate in or monitor the litigation. For all practical purposes, plaintiff's lawyers are the real parties in interest who initiate, finance, and control the litigation. *See, e.g.*, *Mars Steel Corp. v. Continental Ill. Nat'l Bank & Trust Co.*, 834 F.2d 677, 678 (7th Cir. 1987) (Posner, J.).

Samuel M. Hill, *Small Claimant Class Actions: Deterrence and Due Process Examined*, 19 Am. J. Trial Advoc. 147, 148 (1995).

Permitting a plaintiff who lacks Article III standing to represent a class of claimants who may (or may not) have standing will open the floodgates to "lawyer's lawsuits" and clog the courts with dozens of similar claims. *See Van Gemert v. Boeing Co.*, 573 F.2d 733, 735 (2d Cir. 1978), *aff'd* 444 U.S. 472 (1980).[3] The Seventh Circuit correctly surmised that plaintiffs "would be tripping over each other on the way to the courthouse if everyone remotely injured by a violation of law could sue to redress it." *North Shore Gas Co. v. EPA*, 930 F.2d 1239, 1242 (7th Cir. 1991). How much more so when plaintiffs who have not even been injured may sue? For "[i]f passionate commitment plus money for litigating were all that was necessary to open the doors" of the courts, they "might be overwhelmed." *People Organized for Welfare &*

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[3] These types of "suits are not, in any realistic sense, brought either by or on behalf of the class members," but by "private attorneys who initiate suit and who are the only ones rewarded for exposing the defendants' law violations." Martin H. Redish, *Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals*, 2003 U. Chi. Legal F. 71, 77. Injured parties "neither make the decision to sue nor receive meaningful compensation." *Id.* Rather, the prospect of significant attorneys' fees "provide[ ] the class lawyers with a private economic incentive to discover violations of existing legal restrictions on corporate behavior." *Id.* Thus, noninjury class actions to recover compensation simply permit the "private attorneys [to] act[ ] as bounty hunters." *Id. See also Consumer Defense Group v. Rental Housing Industry Members*, 137 Cal. App. 4th 1185, 1189-90 (2006) (reversing trial court-approved settlement where "bounty hunter lawyers wanted to get paid hefty fees, which is what the whole thing was obviously about in the first place."); *Angelucci v. Century Supper Club*, 41 Cal. 4th 160, 178 n.10 (2007) (Private rights of action can lead "to an explosion of assertedly unwarranted or unduly burdensome individual lawsuits brought by professional plaintiffs and bounty-hunting attorneys against business establishments.").

Employment Rights v. Thompson, 727 F.2d 167, 172 (7th Cir. 1984).

These concerns are compounded and especially worrisome in the context of class action litigation.

> The filing of one class action is often the harbinger of more class action filings. As Professor Mullenix has observed, "Class-action litigation has the propensity to propagate, spreading amoeba-like across federal and state courts. No sooner has an attorney filed a class action than, within days, 'copycat' class actions crop up elsewhere. This spontaneous regeneration of class litigation presents challenging issues for litigants and the judiciary."

Scott S. Partridge & Kerry J. Miller, *Some Practical Considerations for Defending and Settling Products Liability and Consumer Class Actions*, 74 Tul. L. Rev. 2125, 2146 (2000) (quoting Linda S. Mullenix, *Dueling Class Actions*, Nat'l L.J., Apr. 26, 1999, at B18); *see also Tanoh v. Dow Chem. Co.*, 561 F.3d 945, 954 (9th Cir.), *cert. denied*, 558 U.S. 934 (2009) (Class Action Fairness Act's "primary purpose was to prevent plaintiffs' lawyers from abusing the class action device, often by filing several 'copycat' actions alleging the same injuries on behalf of the same class of plaintiffs in different state courts.").

Moreover, "noninjury" standing, combined with the class action procedure, results in targeted businesses facing what federal appellate judges bluntly term, "blackmail." *West v. Prudential Sec., Inc.*, 282 F.3d 935, 937 (7th Cir. 2002); *In Matter of Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1299-1300

(7th Cir.), *cert. denied*, 516 U.S. 867 (1995); *Parker v. Time Warner Entm't Co.*, 331 F.3d 13, 26 (2d Cir. 2003) (Newman, J., concurring); *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996); *Gen. Motors Corp.*, 55 F.3d at 784-85, 789. The "blackmail" charge comes from the fact that few class actions actually proceed to judgment—the vast majority settle. *See Thorogood v. Sears, Roebuck and Co.*, 627 F.3d 289, 293 (7th Cir. 2010) ("[T]he structure of class actions under Rule 23 of the federal rules gives class action lawyers an *incentive* to negotiate settlements that enrich themselves but give scant reward to class members, while at the same time the burden of responding to class plaintiffs' discovery demands gives defendants an *incentive* to agree to early settlement that may treat the class action lawyers better than the class."). In fact, counsel on both sides of class action litigation recognize the decision to certify as the most defining moment in the litigation. As this Court noted, "[c]ertification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense." *Coopers*, 437 U.S. at 476. *See also Newton v. Merrill Lynch*, 259 F.3d 154, 164 (3d Cir. 2001) (Once the class is certified, defendant companies are under "hydraulic pressure" to settle). "In short, class actions today serve as the procedural vehicle not ultimately for adversarial litigation but for dealmaking on a mass basis." Nagareda, 103 Colum. L. Rev. at 151.

To interpret Article III as allowing a noninjured plaintiff like Thomas Robins to sue would "drain virtually all meaning" from the standing requirements, *DaimlerChrysler Corp. v. Inman*, 252 S.W.3d 299, 307 (Tex. 2008), and would serve only to enrich

enterprising class action attorneys, rather than remedying injuries as the legal system is intended to do. *See* Casey L. Raymond, Note, *A Growing Threat to the ADA: An Empirical Study of Mass Filings, Popular Backlash, and Potential Solutions Under Titles II and III*, 18 Tex. J. on C.L. & C.R. 235, 248 (2013) (empirically detailing the Americans with Disabilities Act "litigation boom" with "identifiable repeat players in identifiable repeat districts" and concluding, "Profit-motivated private enforcers will continue to litigate if they can make money.").

CONCLUSION

The requirement that a litigant have standing recognizes that courts are not super-legislatures deciding broad questions of policy but rather tribunals best equipped to resolve individual disputes and clearly defined questions of law and fact. Article III requires an actual injury in fact to maintain standing. "Noninjury" lawsuits—particularly "noninjury" class actions, as in this case—are a drain on both economic and judicial resources, to no one's benefit except the plaintiffs' bar.

The decision below should be reversed.

DATED: July, 2015.

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REPLY BRIEF

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SPOKEO, INC.,

Petitioner,

v.

THOMAS ROBINS, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE PENSION RIGHTS CENTER AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

Page

INTEREST OF AMICUS CURIAE 1

SUMMARY OF THE ARGUMENT 3

ARGUMENT 5

A. A Plaintiff Has Standing to Redress Actual, Concrete and Particularized Violations of Statutory Rights 5

B. Spokeo's Argument, if Adopted by this Court, Would Eviscerate ERISA's Comprehensive and Reticulated Scheme 8

C. Denying ERISA Plan Participants the Ability to Assert Fiduciary Breach Claims Based on Statutory Violations Alone Makes the Statute Unworkable 12

CONCLUSION 15

TABLE OF AUTHORITIES

Page

CASES

Berlin v. Michigan Bell Tele. Co., 858 F.2d 1154 (6th Cir. 1988) 4

Central States Se. & Sw. Areas Health & Welfare Fund v. Merck-Medco Managed Care, L.L.C., 433 F.3d 181 (2d Cir. 2005) 11

Central States, Se. & Sw. Areas Pension Fund v. Central Transp., Inc., 472 U.S. 559 (1985) 9

CIGNA Corp. v. Amara, 131 S. Ct. 1866 (2011) 10

David v. Alphin, 704 F.3d 327 (4th Cir. 2013) 12, 13

Donovan v. Bierwirth, 680 F.2d 263 (2d Cir. 1982) 4

Harley v. Minnesota Mining & Mfg. Co., 284 F.3d 901 (8th Cir. 2002) 13

Horvath v. Keystone Health Plan E., Inc., 333 F.3d 450 (3d Cir. 2003) 11

Lockheed Corp. v. Spink, 517 U.S. 882 (1996) 4, 10

Loren v. Blue Cross & Blue Shield of Mich., 505 F.3d 598 (6th Cir. 2007) 11

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) 3, 5, 6, 7

Massachusetts v. E.P.A., 549 U.S. 497 (2007) 7

Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134 (1985) 8, 10, 12, 15

Mertens v. Hewitt Assocs., 508 U.S. 248 (1993) 15

Nachman Corp. v. PBGC, 446 U.S. 359 (1980) 8, 12

TABLE OF AUTHORITIES – Continued

Page

Pender v. Bank of Am. Corp., 788 F.3d 354 (4th Cir. 2015) 11

Perelman v. Perelman, 793 F.3d 368 (3d Cir. 2015) 12

Robins v. Spokeo, Inc., 742 F.3d 409 (9th Cir. 2014) 3

Scanlan v. Eisenberg, 669 F.3d 838 (7th Cir. 2012) 14

Tibble v. Edison Int'l, 135 S. Ct. 1823 (2015) 9

Varity Corp. v. Howe, 516 U.S. 489 (1996) 9

Warth v. Seldin, 422 U.S. 490 (1975) 6

CONSTITUTIONAL PROVISIONS

U.S. Const. art. III ..... *passim*

STATUTES AND REGULATIONS

Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 *et seq.* ..... *passim*

§ 2(2)(b), 29 U.S.C. § 1001(2)(b) 5

§ 2(a), 29 U.S.C. § 1001(a) 9

§ 2(b), 29 U.S.C. § 1001(b) 10

§ 101, 29 U.S.C. § 1021 10

§ 102, 29 U.S.C. § 1022 10

§ 103, 29 U.S.C. § 1023 10

§ 104, 29 U.S.C. § 1024 10

TABLE OF AUTHORITIES – Continued

Page

§ 105, 29 U.S.C. § 1025 10

§ 106, 29 U.S.C. § 1026 10

§ 203, 29 U.S.C. § 1053 10

§ 303, 29 U.S.C. § 1083 10

§ 403, 29 U.S.C. § 1103 9

§ 404, 29 U.S.C. § 1104 ..... 9, 10

§ 405, 29 U.S.C. § 1105 10

§ 406, 29 U.S.C. § 1106 ..... 9, 10

§ 409, 29 U.S.C. § 1109 10

§ 413, 29 U.S.C. § 1113 13

§ 502, 29 U.S.C § 1132 13

§ 502(a), 29 U.S.C. § 1132(a) 10

§ 502(a)(3), 29 U.S.C. § 1132(a)(3) 11

§ 4007, 29 U.S.C. § 1307 10

§ 4022, 29 U.S.C. § 1322 10

Fair Credit Reporting Act (FCRA) ..... *passim*

OTHER AUTHORITIES

H.R. Rep. No. 113-520 (2014) 14

John H. Langbein et al., PENSION AND EMPLOYEE BENEFIT LAW (6th ed. 2015) 8

INTEREST OF AMICUS CURIAE[1]

The Pension Rights Center ("the Center") is a Washington, D.C. nonprofit, nonpartisan consumer organization that has been working for nearly forty years to protect and promote the retirement security of American workers, retirees, and their families. The Center provides legal and strategic advice on retirement income issues, and helps individuals communicate their concerns about these issues to policymakers, courts, and the public.

The issue presented here arises under the Fair Credit Reporting Act ("FCRA"), and asks whether the violation of a legal right conferred upon a plaintiff by Congress constitutes injury in fact for purposes of Article III standing. Although this case does not interpret the Employee Retirement Income Security Act of 1974 ("ERISA"), it nonetheless may be relevant to the participants in and beneficiaries of ERISA-covered plans around the country, depending on how broadly or narrowly the Court resolves the constitutional question presented. If interpreted broadly, the constitutional question presented could potentially implicate claims brought under ERISA, and thus,

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

affect the retirement income security of millions of employees.[2]

The Center has a strong interest in ensuring that Article III is not interpreted to procedurally deny ERISA plan participants standing to sue, thus preventing them from remedying alleged fiduciary breaches or other violations of their statutory rights or enforcing reporting, disclosure, vesting and funding obligations under ERISA. While we write because of our concerns about the implication of this case on people who depend on ERISA protections, ERISA is just one illustration of how a narrow construction of injury for standing purposes would create massive amounts of confusion and uncertainty around statutory law. In light of the significance of the issues presented by this case, the Center respectfully submits this brief to facilitate a full consideration by the Court of these issues.

The Center believes that the Ninth Circuit Court of Appeals' decision in this case – determining that the violation of Respondent's individual statutory right is a concrete, *de facto* injury that satisfies the injury in fact requirement of Article III – should not be disturbed, as it is supported by longstanding precedent.

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[2] Petitioners acknowledge that the question presented could have relevance beyond the FCRA, including ERISA claims. *See* Brief for Petitioner ("Pet'r's Br.") at 10, 17.

Contrary to Petitioner's assertion, the Ninth Circuit did not hold that "a violation of his statutory rights – standing alone – sufficed to establish injury in fact." Pet'r's Br. at 8 (internal quotations omitted). Rather the Ninth Circuit applied the test set forth in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992): "(1) the plaintiff has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Robins v. Spokeo, Inc.*, 742 F.3d 409, 412 (9th Cir. 2014) (internal quotation marks omitted).

The court acknowledged that "the Constitution limits the power of Congress to confer standing." *Id.* at 413. The court explained, however, that those limits do "not prohibit Congress from 'elevating to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law.'" *Id.* The court further held that "the interests protected by the statutory rights at issue are sufficiently concrete and particularized that Congress can elevate them" by statute to Article III injuries. *Id.*

SUMMARY OF THE ARGUMENT

In examining this FCRA matter, the Court of Appeals correctly determined that "alleged violations of [a plaintiff's] statutory rights are sufficient to satisfy the injury in fact requirement of Article III." *Id.* at 413-14. Viewed in the context of ERISA claims, accepting Petitioner's argument could drastically

limit a plan participant's ability to enforce critical fiduciary duties and other ERISA requirements designed "to ensure that employees will not be left empty-handed once employers have guaranteed them certain benefits." *Lockheed Corp. v. Spink*, 517 U.S. 882, 887 (1996).

Once an employer decides to offer its employees retirement benefits, ERISA provides employees with a number of enforceable rights, including: the right to information about plan benefits, the right to adequately funded benefits, the right to benefit insurance through Pension Benefit Guaranty Corporation ("PBGC"), and the right to have their pensions and retirement accounts administered prudently and "with an eye single to the interests of [plan] participants and beneficiaries." *Berlin v. Michigan Bell Tele. Co.*, 858 F.2d 1154, 1162 (6th Cir. 1988) (quoting *Donovan v. Bierwirth*, 680 F.2d 263, 271 (2d Cir. 1982). Fiduciary duties and obligations towards participants and beneficiaries are the "highest known to the law." *See Donovan v. Bierwirth*, 680 F.2d 263, 272 n.8 (2d Cir. 1982).

If adopted, Petitioner's position would deny employees the opportunity to enforce and address violations of these rights *before* they result in pecuniary harm – *i.e.*, the opportunity to *avoid* being "left empty-handed" in retirement. *Lockheed Corp.*, 517 U.S. at 887. In the context of defined benefit pension plans, this could mean that participants could not seek redress for fiduciary mismanagement until they have been deprived of their benefits in retirement – at

which point it would almost certainly be too late to seek redress for a breach of fiduciary duty or other statutory violations because the statute of limitations would have run. Such a standing requirement would be completely contrary to ERISA's express statutory provisions and policy. ERISA provides that:

> It is hereby declared to be the policy of this Act to protect the interests of the participants in employee benefit plans and their beneficiaries by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

ERISA § 2(2)(b), 29 U.S.C. § 1001(2)(b).

The Court of Appeals' decision should be affirmed. If, however, the Court narrows the Ninth Circuit's holding, it should do so in a manner that does not disturb or weaken participants' rights under ERISA.

ARGUMENT

A. A Plaintiff Has Standing to Redress Actual, Concrete and Particularized Violations of Statutory Rights.

There are three requirements for Article III standing – injury in fact, causation, and redressability. *Lujan*, 504 U.S. at 560-61. An "injury in fact" is "an invasion of a *legally protected interest*" that is

"concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Id.* at 560 (emphasis added). Petitioner's argument, distilled to its simplest form, is that where the interest of a plaintiff is "legally protected" by virtue of congressional action, Article III requires *two discrete* injuries: (i) the actual, concrete and particularized invasion of the statutorily protected interest, *see id.*, at 560-61; and (ii) some *additional* monetary or other harm that was recognized by the "English legal tradition." Pet'r's Br. at 17-26. Nothing in the Constitution or this Court's jurisprudence supports this position.

The Court has long recognized that "[t]he injury required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing.'" *Lujan*, 504 U.S. at 578 (quoting *Warth v. Seldin*, 422 U.S. 490, 500 (1975)). Petitioner conflates this well-recognized concept with impermissible congressional attempts to "convert the undifferentiated public interest" into standing to redress "generalized grievance[s]." *Lujan*, 504 U.S. at 575, 577.

Petitioner essentially reduces the injury in fact test enunciated in *Lujan* into a "concrete harm" requirement, pursuant to which the only injuries that qualify are those that existed in the English Legal Tradition. Not only does Petitioner's unworkably narrow approach fail to recognize the many new injuries that have surfaced in the modern world, it is contrary to the well-established principle that "Congress has the power to define injuries and articulate

chains of causation that will give rise to a case or controversy where none existed before." *Massachusetts v. E.P.A.*, 549 U.S. 497, 516-17 (2007).

Petitioner ignores the fact that many statutes, including the FCRA and ERISA, create *individual* rights, the invasion of which constitute *personal* injuries. *Lujan* has already set forth the standard to determine whether Congress has properly established a statutory right, the invasion of which causes injury in fact: a court must ask if the invasion of a statutory right in question is "concrete and particularized" and "actual or imminent." *Lujan*, 504 U.S. at 560 (citations and quotations omitted).

In the case at bar, the violation of Respondent's statutory right under the FCRA was a concrete and particularized injury because it involves the specific and non-abstract act of disseminating information about Respondent.

Similarly, the invasion of an ERISA plan participant's right to the prudent and loyal management of his or her retirement plan is a "concrete and particularized" injury, given that the fiduciaries of the plan owe the fiduciary duties directly to plan participants. Thus any breach of fiduciary duty affects plan participants in a personal and individual way. *Lujan*, 504 U.S. at 560 n.1 (explaining the invasion of legal right is "particularized" if it "affect[s] the plaintiff in a personal and individual way."). To hold otherwise would deprive participants of rights that they would have had before ERISA was passed.

B. Spokeo's Argument, if Adopted by this Court, Would Eviscerate ERISA's Comprehensive and Reticulated Scheme.

Prior to ERISA, an employee's right to her pension benefit was contingent on the good will and financial security of the employer (the plan sponsor); there was no requirement that an employer fully fund the pension trust from which workers' benefits were paid. After several high-profile pension plan failures, including that of the Studebaker Corporation (where most employees received only 15 cents for each pension dollar promised),[3] Congress enacted ERISA to ensure "that if a worker has been promised a defined pension benefit upon retirement – and if he has fulfilled whatever conditions are required to obtain a vested benefit – he actually will receive it." *Nachman Corp. v. PBGC*, 446 U.S. 359, 375 (1980).

"[T]he crucible of congressional concern was misuse and mismanagement of plan assets by plan administrators." *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 141 n.1 (1985) (citation omitted). In that vein, ERISA codified fiduciary duties derived from the common law of trusts, prohibiting plan assets from inuring to the employer, requiring assets to be held in trust until the plan is terminated and all liabilities have been paid, and requiring

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[3] *See* John H. Langbein et al., PENSION AND EMPLOYEE BENEFIT LAW 67-71 (6th ed. 2015). ERISA forbids "fund-specific" defined benefit plans, such as the Studebaker plan, which limit the sponsor's liability to the assets in the fund. *Id.* at 71.

fiduciaries to manage plan assets prudently and solely in the interest of plan participants and beneficiaries. ERISA §§ 403, 404, 406, 29 U.S.C. §§ 1103, 1104, 1106. *See Varity Corp. v. Howe*, 516 U.S. 489, 496 (1996) ("[R]ather than explicitly enumerating *all* of the powers and duties of trustees and other fiduciaries, Congress invoked the common law of trusts to define the general scope of their authority and responsibility."); *Tibble v. Edison Int'l*, 135 S. Ct. 1823, 1828 (2015) (explaining that "[i]n determining the contours of an ERISA fiduciary's duty, courts often must look to the law of trusts") (quoting *Central States, Se. & Sw. Areas Pension Fund v. Central Transp., Inc.*, 472 U.S. 559, 570 (1985).

Congress also recognized that additional protections were necessary to protect employee retirement security. *See* ERISA § 2(a), 29 U.S.C. § 1001(a) (noting "the lack of employee information and adequate safeguards," the "inadequacy of current minimum standards," and the "depriv[ation] of anticipated benefits" due to "the termination of plans before requisite funds have been accumulated."). To address these concerns, Congress enacted numerous additional procedural and substantive protections for plan participants and beneficiaries, including minimum funding, participation, and vesting requirements, insurance of plan benefits through the PBGC, and rules

concerning reporting and disclosures.[4] *See also Lockheed Corp.*, 517 U.S. at 887.

Congress provided plan participants with the ability to enforce these procedural and substantive rights through "six carefully integrated civil enforcement provisions found in § 502(a) of the statute." *Russell*, 473 U.S. at 146 (citing 29 U.S.C. § 1132(a)). The civil enforcement provisions of ERISA accomplished one of the major purposes of the statute – to provide for "appropriate remedies, sanctions and ready access to the Federal courts." ERISA § 2(b), 29 U.S.C. § 1001(b).

As this Court recently recognized, the "actual harm" caused by a breach of fiduciary duty may "come from the loss of a right protected by ERISA or its trust-law antecedents." *CIGNA Corp. v. Amara*, 131 S. Ct. 1866, 1881 (2011). Consequently, in order to show injury for Article III purposes, a participant should not be required to show anything more than the violation of a statutory right.

If Spokeo's position were adopted by this Court, many of the protections which Congress believed were essential to protect the interests of participants and beneficiaries would be crippled. Such a holding would put into doubt the opinions of numerous courts that have recognized that the violation of

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[4] *E.g.*, 29 U.S.C. §§ 1021-26, 1053, 1083, 1104-06, 1109, 1307, 1322.

ERISA-conferred disclosure rights, without more, constitutes injury in fact for the purposes of claims seeking equitable and other injunctive relief pursuant to ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3). *See Horvath v. Keystone Health Plan E., Inc.*, 333 F.3d 450, 456 (3d Cir. 2003) (holding that because "the disclosure requirements and fiduciary duties contained in ERISA create in [a plan participant] certain rights, including the rights to receive particular information and to have [fiduciaries] act in a fiduciary capacity," a plan participant "need not demonstrate actual harm in order to have standing to seek injunctive relief requiring that [a fiduciary] satisfy its statutorily-created disclosure or fiduciary responsibilities"); *Loren v. Blue Cross & Blue Shield of Mich.*, 505 F.3d 598, 610 (6th Cir. 2007) (where a plaintiff seeks equitable relief to enforce ERISA, "violation of the fiduciary duty owed to [plaintiff] as a participant in and beneficiary of their respective ERISA plans" is "sufficient to establish injury-in-fact for purposes of constitutional standing"); *Central States Se. & Sw. Areas Health & Welfare Fund v. Merck-Medco Managed Care, L.L.C.*, 433 F.3d 181, 199 (2d Cir. 2005) ("a plan participant may have Article III standing to obtain injunctive relief related to ERISA's disclosure and fiduciary duty requirements without a showing of individual harm"); *Pender v. Bank of Am. Corp.*, 788 F.3d 354, 366 (4th Cir. 2015) (holding that participant need not show financial loss to sue for disgorgement of profits because "to have any teeth, the available remedies [under ERISA] must be able to reach situations where a plan sponsor benefits from an

ERISA violation, but plan participants – perhaps through luck or agency intervention – suffer no monetary loss").

C. Denying ERISA Plan Participants the Ability to Assert Fiduciary Breach Claims Based on Statutory Violations Alone Makes the Statute Unworkable.

As this Court has noted, ERISA has an "interlocking, interrelated, and interdependent remedial scheme" which is in turn part of a "'comprehensive and reticulated statute.'" *Russell*, 473 U.S. at 146 (quoting *Nachman*, 446 U.S. at 361). As described above, this complex scheme was designed to insure that plan participants will never be in a position where they have lost benefits. To require participants to show more than the violation of a statutory duty owed to them in order to establish Article III standing destroys this carefully crafted scheme.

David v. Alphin, relied upon by Petitioner to establish a circuit split, demonstrates the harm that results when courts require ERISA participants to establish an injury beyond the violation of a statutory right for Article III standing purposes. There, the court held that a participant did not have standing to sue for a fiduciary breach that caused losses to his defined benefit pension plan because he had not shown that the plan was underfunded or that he had lost benefits. *David v. Alphin*, 704 F.3d 327, 336-38 (4th Cir. 2013). *See also Perelman v. Perelman*, 793

F.3d 368 (3d Cir. 2015); *Harley v. Minnesota Mining & Mfg. Co.*, 284 F.3d 901 (8th Cir. 2002).

Requiring participants to show that they have lost benefits in order to sue for fiduciary breaches not only adds a pleading element to ERISA section 502 that Congress did not include, but it also makes ERISA's statute of limitations for fiduciary breaches unworkable. ERISA, with exceptions for fraud and concealment, requires participants to bring fiduciary breach claims within three years of actual knowledge of the breach or six years from the last act that constitutes the breach. ERISA § 413, 29 U.S.C. § 1113. The statute of limitations will likely have expired before the participant has standing to sue for even the most disloyal fiduciary acts if he is first required to show that he has lost benefits as a result of the breach.

Similarly, to require the plan to be underfunded in order to establish Article III injury is not only inconsistent with ERISA's statute of limitations provisions as described above, but also requires courts to resolve complex issues that the statute does not address. Under ERISA's funding standards, a plan may be fully funded one day and, due to market conditions and interest rate changes, underfunded the next day. Thus, a plan could be "overfunded at the time of the breach, underfunded when losses were incurred, overfunded at the initiation of litigation, and underfunded when the benefit payments become due." *Alphin*, 704 F.3d at 337 (citing Br. of the Sec'y of Labor as Amicus Curiae in Support of

Plaintiffs-Appellants Urging Reversal). Moreover, Congress has at times provided temporary funding relief to plans, making it unclear what funding standard should apply to determine whether the plan is underfunded. *See, e.g.*, H.R. Rep. No. 113-520, pt. 1, at 19 (2014) (explaining the purpose of recent legislation which temporarily "modified the interest rates used in valuing pension liabilities to give employers the option to effectively spread out the higher contributions over a longer period of time" than otherwise required under ERISA). Requiring a plan to be underfunded in order to establish Article III injury requires a court to resolve these complex legal and factual issues without any guidance from the statute as to the relevant considerations.

Finally, requiring a plan participant to show more than the violation of a statutory right for Article III purposes puts the participant in a worse position than before the statute was passed. Trust law recognized that beneficiaries have an equitable interest in the prudent and loyal management of trust assets, and that violations of those fiduciary standards is enough to establish injury for Article III purposes. *See Scanlan v. Eisenberg*, 669 F.3d 838, 843-46 (7th Cir. 2012). To require more in the ERISA context makes a mockery of Congress's carefully crafted scheme to give ERISA participants and beneficiaries added protections and to provide ready access to the federal courts to protect their interests.

These problems would be resolved if this Court re-affirms that the violation of a statutory right is

sufficient to establish Article III standing. This Court has reiterated its reluctance to add remedies and causes of action to ERISA because its "carefully crafted and detailed enforcement scheme provides 'strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly.'" *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 254 (1993) (citing *Russell*, 473 U.S. at 146-47 (emphasis in original)). So too, additional requirements should not be added to this carefully crafted and detailed enforcement scheme that stand in the way of participants and beneficiaries enforcing their statutory rights under the guise of Article III standing requirements.

CONCLUSION

Because Respondent sufficiently satisfies Article III standing by virtue of the alleged violations of his individual statutory rights under the FCRA, the Court of Appeals' decision should be affirmed. If, however, the Court further narrows the Ninth Circuit's holding, it should do so in a manner that confirms that participants in ERISA cases have standing under Article III to sue to redress ERISA procedural and substantive violations, including fiduciary breaches that have put their retirement security at risk.

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REPLY BRIEF

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IN THE

Supreme Court of the United States

SPOKEO, INC.,

Petitioner,

v.

THOMAS ROBINS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICI CURIAE PUBLIC CITIZEN, INC., AARP, AND MFY LEGAL SERVICES, INC. IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF AMICI CURIAE 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. Congress Has Broad Authority to Create Legal Rights and to Provide Remedies for Their Violation. 6

A. Violations of Legal Rights Were Actionable at the Time of the Constitution's Adoption 7

B. This Court Has Recognized Congress's Broad Authority to Define Property Rights and Injuries. 10

II. FCRA Is Narrowly Drafted to Protect Interests Akin to Those Recognized at Common Law. 13

A. Through FCRA, Congress Elevated the *De Facto* Harm of Inaccurate Consumer Information to a Legally Cognizable Injury 14

B. The Harms Congress Identified Are Similar to Those Redressed by Causes of Action at Common Law. 17

C. Inaccurate Consumer Reporting Is a "Concrete Harm." 21

D. Congress May Choose the Means to Deter or Remedy the Harm It Identifies. 27

III. Recognizing That FCRA Plaintiffs Have Standing Based on Inaccurate Consumer Reports Poses No Separation-of-Powers Problem 30

CONCLUSION 34

TABLE OF AUTHORITIES

Page(s)

Cases

Andrews v. Trans Union Corp.,
7 F. Supp. 2d 1056 (C.D. Cal. 1998) 29

Ashby v. White,
(1704) 1 Eng. Rep. 417 (H.L.); 1 Brown. 62 7

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(1703) 87 Eng. Rep. 808 (Q.B.);
6 Mod. 45 ..... 7, 8, 19, 25

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(1703) 92 Eng. Rep. 126 (Q.B.);
2 Ld. Raym. 938 24

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Ass'n of Data Processing Serv. Orgs. v. Camp,
397 U.S. 150 (1970) 6

Beaudry v. TeleCheck Servs.,
579 F.3d 702 (6th Cir. 2009) 33

Boggio v. USAA Fed. Sav. Bank,
696 F.3d 611 (6th Cir. 2012) 16

Califano v. Yamasaki,
442 U.S. 682 (1979) 29

Coleman v. Miller,
307 U.S. 433 (1939) 4, 5, 6, 22

Connell v. Higginbotham,
403 U.S. 207 (1971) 10, 11

Doe v. Chao,
540 U.S. 614 (2004) 6, 15, 16, 18, 27, 28

Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.,
472 U.S. 749 (1985) 18, 19

Ex parte Levitt,
302 U.S. 633 (1937) 31

F W. Woolworth Co. v. Contemporary Arts, Inc.,
344 U.S. 228 (1952) 24

FEC v. Akins,
524 U.S. 11 (1998) 32

Feltner v. Columbia Pictures Television, Inc.,
523 U.S. 340 (1998) 24

Flast v. Cohen,
392 U.S. 83 (1968) 21

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC),
528 U.S. 167 (2000) 6, 27, 33

Goldberg v. Kelly,
397 U.S. 254 (1970) 11

Goss v. Lopez,
419 U.S. 565 (1975) 10, 11

Greenway v. Info. Dynamics, Ltd.,
399 F. Supp. 1092 (D. Ariz. 1974) 29

Havens Realty Corp. v. Coleman,
455 U.S. 363 (1982) 11, 12, 13

Hotaling v. Church of Jesus Christ of Latter-Day Saints,
118 F.3d 199 (4th Cir. 1997) 25

Keech v. Sanford,
(1726) 25 Eng. Rep. (Ch.) 223;
Sel. Cas. T. King 61 25

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992) 5, 13, 14, 28, 30, 31, 32

Marbury v. Madison,
5 U.S. (1 Cranch) 137 (1803) 9, 10

Marzetti v. Williams,
(1830) 109 Eng. Rep. 842 (K.B.);
1 B. & AD. 415 ..... 19, 20, 23, 24, 25

Massachusetts v. EPA,
549 U.S. 497 (2007) 30

Parks v. IRS,
618 F.2d 677 (10th Cir. 1980) 18

Pichler v. UNITE,
542 F.3d 380 (3d Cir. 2008) 18

Prince Albert v. Strange,
(1849) 2 DeGex & Sm. 652 20

Raines v. Byrd,
521 U.S. 811 (1997) 21, 30, 32

Schlesinger v. Reservists Comm. to Stop the War,
418 U.S. 208 (1974) 31

Seamans v. Temple Univ.,
744 F.3d 853 (3d Cir. 2014) 17

Sierra Club v. Morton,
405 U.S. 727 (1972) 30, 32

Sprint Commc'ns Co. v. APCC Servs.,
554 U.S. 269 (2008) 5, 17

Steel Co. v. Citizens for a Better Env't,
523 U.S. 83 (1998) 5, 17

Tigner v. Texas,
310 U.S. 141 (1940) 27

United States v. Richardson,
418 U.S. 166 (1974) 5, 31

Vermont Agency of Natural Res. v. U.S. ex rel. Stevens,
529 U.S. 765 (2000) 4, 5, 6, 17, 28

Warth v. Seldin,
422 U.S. 490 (1975) 12, 13

Washington v. CSC Credit Servs.,
199 F.3d 263 (5th Cir. 2000) 14, 29, 33

Webb v. Portland Mfg. Co.,
29 F. Cas. 506 (C.C.D. Me. 1838) (No. 17,322) 9

Wolff v. McDonnell,
418 U.S. 539 (1974) 11

Constitutional Provisions

U.S. Const. art. II, § 3 31

U.S. Const. art. III, § 2 5

Statutes, Rules, and Legislative Materials

15 U.S.C. § 1681 ..... 2, 4, 14, 16, 18

15 U.S.C. § 1681c 16

15 U.S.C. § 1681e 3, 14, 16, 33

15 U.S.C. § 1681l 16

15 U.S.C. § 1681n 3, 14, 33

15 U.S.C. § 1681s-2 16

42 U.S.C. § 3604 11

Fed. R. Civ. P. 12(b)(6) 29

S. Rep. No. 91-517 (1969) 14, 15, 16, 18

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Restatement (Second) of Torts § 163 (1965) 23

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Spokeo, Frequently Asked Questions, www.spokeo.com/faqs 3

INTEREST OF AMICI CURIAE

This brief is submitted on behalf of three organizations interested in the effective enforcement of consumer-protection laws, including the law at issue in this case, the Fair Credit Reporting Act, or FCRA.[1] Amici are concerned that the argument advanced by petitioner here, that respondent lacks standing to pursue a cause of action for statutory damages conferred on him by Congress under FCRA, would impair the effectiveness of the consumer protections provided for in FCRA by impeding consumers' ability to seek correction of inaccurate credit information and statutory damages for publication of false consumer information. This cause of action closely resembles actions, available at common law at the time of the Constitution's adoption, designed to protect reputational and privacy interests. Amici believe that a ruling in petitioner's favor will adversely affect a broad range of consumer-protection statutes.

Public Citizen, Inc., a consumer-advocacy organization with members and supporters nationwide, works before Congress, administrative agencies, and courts for the enactment and enforcement of laws protecting consumers, workers, and the public. Public Citizen is interested in the effective enforcement of consumer-protection laws, including FCRA. In addi-

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[1] Pursuant to Supreme Court Rule 37.6, amici state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than amici or its counsel, made a monetary contribution intended to fund the preparation and submission of this brief. All parties have consented to the filing of this brief; letters of consent have been lodged with the Clerk.

tion, Public Citizen has often litigated issues of standing as a party or amicus.

AARP is a nonprofit, nonpartisan organization that helps people turn their goals and dreams into real possibilities, strengthens communities, and advocates on the issues that matter most to families, such as healthcare, employment and income security, retirement planning, affordable utilities, and protection from financial abuse. As the leading advocate for people 50+, AARP has a substantial interest in safeguarding the ability of consumers, employees, investors, and others to enforce statutory protections and ensure that the information reported about them is accurate.

MFY Legal Services, Inc. (MFY) has provided free legal assistance to vulnerable and underserved residents of New York City for over 50 years on a wide range of civil legal issues. MFY's Consumer Rights Project provides advice on a range of consumer problems, including the pervasive problem of credit report errors. Such errors, which happen with alarming frequency due to identity theft, mistaken identity, and careless procedures by credit reporting bureaus, prevent MFY's clients from accessing credit, employment, and housing, and perpetuate the cycle of poverty. The issue of standing under the FCRA is of particular concern to MFY and directly impacts its clients.

INTRODUCTION AND SUMMARY OF ARGUMENT

Through the Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681 *et seq.*, Congress recognized that a consumer's credit information is a highly valuable asset—an asset that requires protection from the harm

of false or irrelevant reporting. The potential for harm is just as real and even more prevalent today than when Congress passed FCRA in 1970. Now, myriad consumer reporting agencies—like petitioner Spokeo, Inc.—issue online consumer profiles on "anyone" and accessible to everyone, including "consumers, businesses, and non-profits," at the click of a button. Spokeo, Frequently Asked Questions, www.spokeo.com/faqs ("What is Spokeo?").

In this case, the plaintiff, Thomas Robins, alleges that the defendant, Spokeo, Inc., compiled a consumer report about him that included false information about his age, marital status, education, economic health, and profession; even the photo in the report was not of him. J.A. 14 ¶¶ 31-32. Robins alleges that Spokeo willfully failed to follow reasonable procedures to ensure the accuracy of its reports, directly leading to these inaccuracies in Spokeo's consumer report about him, violating FCRA, § 1681e(b), and entitling him to statutory damages under § 1681n, as well as an injunction. J.A. 21 ¶ 65. Robins, who is unemployed, alleges that Spokeo actively markets its consumer reports to employers, and that Spokeo's report about him has negatively affected his employment prospects and caused him significant anxiety. J.A. 13-15 ¶¶ 26, 34-37.

Robins's allegations that Spokeo infringed his legally protected interests under FCRA satisfy the requirements for Article III standing. First, Congress has substantial authority to define legally protected interests and to provide standing for claims based on invasions of those interests, including intangible injuries that encompass no physical or pecuniary losses. Early U.S. and English cases had a broad view of the

types of actions amenable to the judicial process, recognizing that violations of individuals' legal rights were actionable injuries. As the Court has recognized, Congress, within the scope of its Article I powers, has broad authority to define individual legal rights by statute and provide judicial remedies for their violation, consistent with Article III.

Second, although the traditional concept of "cases and controversies" has a wide berth, Congress acted narrowly under FCRA and identified harms to personal interests closely related to those protected by privacy and defamation actions under the common law. Congress therefore identified a pre-existing *de facto* injury that warranted protection—the public dissemination of false personal information about an individual—and provided a legal remedy for this injury. Congress also recognized the importance of procedures to ensure consumers' privacy as well as the relevancy and accuracy of consumer information in light of the new and "elaborate mechanism" of credit reporting that had been developed to amass and disseminate great quantities of information about consumers, their "credit worthiness," "character, and general reputation." § 1681. Congress identified concrete harms attributable to credit reporting abuses and created a private cause of action that would fit comfortably within "the traditional concern of the courts at Westminster." *Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 773 (2000) (quoting *Coleman v. Miller*, 307 U.S. 433, 460 (1939) (opinion of Frankfurter, J.)). In making the injury legally cognizable, Congress acted well within whatever boundaries Article III imposes upon its authority to confer standing by defining statutory rights and remedies.

Finally, Robins brings his claims against a private party based on his own injury caused by that party. This case therefore does not pose the separation-of-powers concerns that underscored this Court's decisions involving executive action and "generalized grievances." *See, e.g.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-63 (1992); *United States v. Richardson*, 418 U.S. 166, 176-80 (1974). Congress's power to create rights of action is at its broadest where, as here, its action does not impinge on the interests of the executive.

ARGUMENT

Article III of the Constitution provides that "[t]he judicial Power shall extend to all Cases, in Law and Equity, arising under ... the Laws of the United States." U.S. Const. art. III, § 2. This Court has construed Article III's limitation of the judicial power to "Cases" and "Controversies" to require that a plaintiff have standing to maintain an action—that is, the plaintiff must have suffered an injury in fact that is fairly traceable to the defendant and likely to be redressed by a favorable decision. *Lujan*, 504 U.S. at 560-61. The plaintiff must have a "personal stake" in the outcome of the suit, and the case must be "of the sort traditionally amenable to, and resolved by, the judicial process"—that is, similar to matters considered capable of resolution by "the courts at Westminster." *Vermont Agency*, 529 U.S. at 774 (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102 (1998), and *Coleman*, 307 U.S. at 460 (opinion of Frankfurter, J.)); *see Sprint Commc'ns Co. v. APCC Servs.*, 554 U.S. 269, 288 (2008) ("[T]he general 'personal stake' requirement and the more specific stand-

ing requirements (injury in fact, redressability, and causation) are flip sides of the same coin.").

I. Congress Has Broad Authority to Create Legal Rights and to Provide Remedies for Their Violation.

This Court has recognized that Congress may "define new legal rights," *Vermont Agency*, 529 U.S. at 773, and that injury-in-fact under Article III does not require damage to physical or pecuniary interests but may derive from a range of less tangible concerns—for instance, those that are emotional, "spiritual," "aesthetic, conservational, [or] recreational." *Ass'n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153-54 (1970); *see also Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC)*, 528 U.S. 167, 181-83 (2000) (finding standing based on frustrated desire to "fish, camp, swim, and picnic in and near [a] river"); *Doe v. Chao*, 540 U.S. 614, 617-18 (2004) (finding standing based on emotional harm).

This Court has recognized that, to determine what the drafters of the Constitution meant by the terms "cases" and "controversies," one should look to the "matters that were the traditional concern of the courts at Westminster." *Vermont Agency*, 529 U.S. at 774 (quoting *Coleman*, 307 U.S. at 460 (opinion of Frankfurter, J.)). This Court's early cases and those of the Westminster courts recognized broad legislative power to identify and provide causes of action for intangible injuries. These cases treated legal rights as a form of property and established that the violation of a legal right is an injury. Consistent with these early cases, this Court has affirmed that Congress's authority to identify injuries and provide judicial remedies for them is broad.

A. Violations of Legal Rights Were Actionable at the Time of the Constitution's Adoption.

To the Framers of the Constitution, recognizing the violation of a person's statutory right as an "injury" would not have seemed strange—no stranger than recognizing deprivation of any other property as an injury. As James Madison explained, "In its larger and juster meaning, property embraces every thing to which a man may attach a value and have a right .... In a word, as a man is said to have a right to his property, he may equally be said to have a property in his rights." James Madison, *Property* (1792), 14 The Papers of James Madison 266.

By the time of the Constitution's adoption, the debate over whether the deprivation of legal rights—even without separate pecuniary or physical injury—was actionable had been settled favorably in English courts for nearly a century. In *Ashby v. White*, (1704) 1 Eng. Rep. 417 (H.L.) 418; 1 Brown. 62 ("*Ashby II*"), the House of Lords reversed the majority decision of the Queen's Bench, which had held that the plaintiff, Ashby, who had been deprived of the right to vote, had no standing for lack of damages and injury, *Ashby v. White*, (1703) 87 Eng. Rep. 808 (Q.B.) 810-11; 6 Mod. 45 ("*Ashby I*") (opinion of Gould, J.), and adopted Chief Justice Holt's dissenting opinion. The Lords held that Ashby had standing to challenge deprivation of his legal right to vote, upheld the jury's award of damages, and awarded costs. *Ashby II*, 1 Eng. Rep. at 418; *see Ashby v. White*, 17 H.L. Jour. 526 (Mar. 27, 1704), *available at* http://www.british-history.ac.uk/lords-jrnl/vol17/pp526-53 ("*Ashby* Lords Rep.").

The House of Lords held that Ashby suffered an injury when he was deprived of the right to vote, even though he incurred no monetary damage and his vote would not have affected the election's outcome. *See Ashby* Lords Rep. at 529; *Ashby I*, 87 Eng. Rep. at 816.[2] The Lords rejected the proposition that Ashby "had no Damage, or at least that there was no such Injury or Damage done to him as would support an Action" because, they held, "the Law will never imagine any such Thing as *Injuria sine Damno*; every Injury imports Damage in the Nature of it." *Ashby* Lords Rep. at 529; *see Ashby I*, 87 Eng. Rep. at 816 ("[F]or damages do not consist in things pecuniary, but in a disturbance of right."). The House of Lords analogized the case to one for trespass where the plaintiff would have a cause of action even if there was "no Pecuniary Damage done to the Value of a Farthing." *Ashby* Lords Rep. at 529. Chief Justice Holt's opinion similarly relied on other causes of action that are actionable without separate harm, including defamation without injury to reputation, trespass, and battery without bodily injury. *Ashby I*, 87 Eng. Rep. at 816.

Having determined that the statute in question created a legal entitlement, the Lords concluded that Ashby could seek to remedy the violation of law with a judicial action for damages and that such a case was precisely the sort where a party should "resort to the courts of *Westminster Hall*." *Ashby* Lords Rep. at 532, 534 (emphasis in original). Indeed, "there [was] no other Court or Jurisdiction appointed by the Law of

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[2] References to *Ashby I* are to Chief Justice Holt's dissenting opinion unless otherwise noted.

England, for determining the Right and repairing this Injury, but the Courts of *Westminster*." *Id.* at 531 (emphasis in original).

Not long after our Constitution was adopted, Justice Story relied on *Ashby* to hold that a plaintiff could maintain an action for diversion of water from a stream leading to his mill, even though the diversion affected only the defendant's share of the water and caused no harm to the plaintiff. *Webb v. Portland Mfg. Co.*, 29 F. Cas. 506, 508, 510-11 (C.C.D. Me. 1838) (No. 17,322). Justice Story explained:

> I am not able to understand, how it can be correctly said, in a legal sense, that an action will not lie, even in case of a wrong or violation of a right, unless it is followed by some perceptible damage, which can be established, as a matter of fact; in other words, that injuria sine damno is not actionable.

Id. at 507. He concluded that when a party suffers a violation of a legal right that causes no pecuniary loss, or where it is "impracticable" to prove actual damages, the party is "entitled to maintain his action for nominal damages, in vindication of his right." *Id.* at 508.

In *Marbury v. Madison*, too, Marbury sought judicial vindication of his statutory right to a five-year term as justice of the peace, and the Court effectively acknowledged his standing to do so when it said that the federal courts had the power to adjudicate his claims because "[the judicial] power is expressly extended to all cases arising under the laws of the United States, and consequently in some form, may be exercised over the present case; because the right claimed is given by a law of the United States." 5 U.S.

(1 Cranch) 137, 153-54, 173-74 (1803) (holding that the Supreme Court did not have original jurisdiction, however). The Court rejected the argument that Marbury's case was not actionable due to a lack of harm. *Id.* at 164. Although most appointments could be revoked by the President at will—and thus there would be no injury where there was no deprivation of a vested right—Marbury's position had been "created by special act of congress, and ha[d] been secured, so far as the laws can give security to the person appointed to fill it, for five years." *Id.* "It is not then on account of the worthlessness of the thing pursued," the Court explained, "that the injured party can be alleged to be without remedy." *Id.*

As these examples illustrate, the early federal courts and the Westminster courts were open to cases seeking vindication for violation of legal rights, regardless of whether separate tangible or pecuniary injury was shown.

B. This Court Has Recognized Congress's Broad Authority to Define Property Rights and Injuries.

This Court has applied this traditional notion of broad legislative authority to create and define legally protected rights, and it has recognized by implication that the deprivation or violation of those rights is an injury. In *Goss v. Lopez*, 419 U.S. 565, 572-74 (1975), for instance, the Court recognized that "[p]rotected interests in property .... are created and their dimensions are defined by ... statutes or rules entitling the citizen to certain benefits." This Court has recognized that statutes have created legal rights to public education, continued employment, welfare, and "good-time credits" for prisoners. *Id.* at 573 (citing *Connell v.*

Higginbotham, 403 U.S. 207 (1971) (continued employment), *Goldberg v. Kelly*, 397 U.S. 254 (1970) (welfare), and *Wolff v. McDonnell*, 418 U.S. 539 (1974) (good-time credits)). Implicit in the Court's holdings that the government's withdrawal of such rights requires procedural due process is the recognition that deprivation of these statutory rights is an injury to the individual entitled to them. *See id.* at 572-74. Such interests are protected legally even though, absent the statutes creating them, an individual would have no entitlement to these benefits. *Id.* at 574 ("Although Ohio may not be constitutionally obligated to establish and maintain a public school system, it has nevertheless done so .... [T]he State is constrained to recognize a student's legitimate entitlement to a public education as a property interest which is protected by the Due Process Clause ....").

Particularly relevant here is the Court's holding that receiving false information in violation of a statutory right to receive truthful information is sufficient injury for standing. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373-74 (1982). In *Havens Realty*, the Court considered § 804(d) of the Fair Housing Act, 42 U.S.C. § 3604(d), through which Congress "conferred on all 'persons' a legal right to truthful information about available housing." 455 U.S. at 373. The Court held that "[a] tester who has been the object of a misrepresentation made unlawful under § 804(d) has suffered injury in precisely the form the statute was intended to guard against, and therefore has standing to maintain a claim for damages under the Act's provisions," even though the tester expected to receive false information (and therefore was not misled) and had no intention of buying or renting a home. *Id.* at 373-74.

Petitioner attempts to distinguish *Havens Realty* on the ground that "[a]lthough the black tester had no intention of actually buying or renting a home, he [sic] nonetheless suffered the invidious and serious harm of discrimination on the basis of his [sic] race." Pet. Br. 41. Although it is true that a victim of racial discrimination suffers a concrete injury, the Court did not rest its Article III standing analysis of § 804(d) on that injury, or even mention it in its discussion of standing. Instead, it rested its holding on the violation of legal rights, and in particular the right to truthful information, provided under the Fair Housing Act. *Havens Realty*, 455 U.S. at 373-74.[3]

Based on the traditional concept that the deprivation of a legal right is an injury, this Court has stated that, at least in principle, "[t]he actual or threatened injury required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing.'" *Warth v. Seldin*, 422 U.S. 490, 500 (1975). As Justice Scalia once explained, "Standing requires ... the allegation of some particularized injury to the individual plaintiff. But legal injury is by definition no more than the violation of a legal right; and legal rights can be created by the legislature." Antonin Scalia, *The Doctrine of Standing As an Essential Element of the Separation of Powers*, 17 Suffolk U. L. Rev. 881, 885 (1983). Standing based on a statutory

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[3] The Court also considered the testers' argument that they had been deprived of the benefits of living in a racially integrated community, and it accepted that such an injury could provide a basis for Article III standing under § 812 of the Act. *Id.* at 375-76. However, the Court held that the plaintiffs had not sufficiently pleaded this injury and should re-plead if they wished to rely on it. *Id.* at 377-78.

violation thus "depends upon whether the legislature has given *me personally* a right to be free of [the disputed] action." *Id.* And *Havens Realty* demonstrates that the statutory rights of action envisioned in *Warth* can in fact constitutionally exist. *See Havens Realty*, 455 U.S. at 373.

Other statements by the Court appear to be in tension with *Warth* and suggest that Article III may impose additional limits on congressional power. To the extent such additional limits exist, this Court has yet to demarcate the precise constitutional boundary of Congress's authority to provide judicial remedies for violations of statutory rights and has suggested that the limits of this power are unclear. *See Lujan*, 504 U.S. at 578 (discussing *Warth*). The Court has, however, explained that, at a minimum, Congress's authority includes the ability to "elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law." *Id.* That minimum congressional authority is sufficient to decide this case.

II. FCRA Is Narrowly Drafted to Protect Interests Akin to Those Recognized at Common Law.

Although early U.S. and common-law cases, as well as more recent jurisprudence, suggest that the traditional concept of "cases and controversies" was broad and that Congress has significant authority to define legally protected rights, this case does not require the Court to explore the outer limits of congressional authority. In FCRA, Congress did not purport to create some entirely new form of injury hitherto unknown to the law, nor one that strains the common understanding of what it is for an individual to suffer a real harm

to a genuine personal interest. Instead, Congress "elevat[ed] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law." *Lujan*, 504 U.S. at 578 (citations omitted). Specifically, Congress identified harms to personal interests related to those traditionally protected by privacy and defamation actions under the common law and appropriately exercised its prerogative to determine the means to address those harms.

A. Through FCRA, Congress Elevated the *De Facto* Harm of Inaccurate Consumer Information to a Legally Cognizable Injury.

In enacting consumer protection statutes, Congress identifies prevalent harms to consumers that it seeks to prevent or remedy. In FCRA, Congress addressed the harms of inaccurate consumer information and infringement of consumers' right to privacy. *See* § 1681(a)(4), (b). Indeed, FCRA's stated purpose is to require "the confidentiality, accuracy, relevancy, and proper utilization of [consumer] information" and to ensure that consumer-reporting agencies provide due "respect for the consumer's right to privacy." *Id.*; *see* S. Rep. No. 91-517, at 1 (1969) (FCRA "enable[s] consumers to protect themselves against arbitrary, erroneous, and malicious credit information" and "seeks to prevent an undue invasion of the individual's right of privacy in the collection and dissemination of credit information"). Among the means Congress chose for addressing these harms was the creation of a cause of action for individuals if a consumer reporting agency's willful failure to follow reasonable procedures led to inaccurate reports about them. §§ 1681e(b), 1681n; *see Washington v. CSC Credit Servs.*, 199 F.3d 263, 267 n.3 (5th Cir. 2000).

Aside from the direct injury inherent in the reporting of inaccurate consumer information, Congress also recognized the tendency of false information to cause further consequential harm to consumers. When passing the proposed bill, the Senate Committee noted that the bill would "prevent consumers from being unjustly damaged because of inaccurate or arbitrary information in a credit report." S. Rep. No. 91-517, at 1. The report noted that inaccurate information harms consumers because consumers may not even be aware of inaccurate information in credit reports and when aware, consumers often "have difficulty in correcting inaccurate information." *Id.* at 3. It recognized that inaccurate information can not only make obtaining credit difficult, but also "a consumer's future employment career could be jeopardized because of an incomplete credit report." *Id.* at 4.

Here, Robins pleaded that Spokeo's report about him conveyed a plethora of inaccuracies: that "he was in his 50s, that he was married, that he was employed in a professional or technical field, [] that he ha[d] children," that he had a graduate degree, and that he was in the "Top 10%" wealth bracket. J.A. 14 ¶¶ 31-32. Even the photo on his report was a picture of someone else. *Id.* ¶ 31. Robins alleged that Spokeo's inaccurate report "caused actual harm to [his] employment prospects" and he "has suffered actual harm in the form of anxiety, stress, concern, and/or worry about his diminished employment prospects." J.A. 14-15 ¶¶ 35, 37.[4]

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[4] Robins's allegations of anxiety are more than enough under this Court's decision in *Chao*, 540 U.S. at 617-18, which held that the plaintiff there had Article III standing to bring a claim

(*Footnote continued*)

Spokeo and its amici make much of the fact that the false information in Robins's report was supposedly "positive" and therefore somehow helpful and not harmful to Robins. *See* Pet. Br. 4-5, 10, 51-52; Background Screeners Br. 32-33. However, the plain wording of the statute does not turn on whether inaccurate information is "helpful" or "detrimental." Congress consistently recognized inaccurate information is *inherently* detrimental. *See* § 1681 (four uses of "accurate," "inaccurate," or "accuracy"); § 1681e(b) (requiring procedures to "assure maximum possible accuracy"); *see also generally* S. Rep. No. 91-517 (repeatedly referring to the purpose of ensuring accuracy of credit reports as well as preventing adverse credit reports). Moreover, when Congress intended to limit FCRA provisions to negative information, it did so expressly. *See* §§ 1681c(a)(5), 1681l (referring to "adverse" information); § 1681s-2(a)(7) (requiring notices regarding furnishing of "negative" information). Similarly, the federal courts of appeals have recognized that FCRA targets inaccuracies. *See, e.g.*, *Boggio v. USAA Fed. Sav. Bank*, 696 F.3d 611, 617 (6th Cir. 2012) (discussing term "inaccurate" under §§ 1681s-2(b)(1)(D) and 1681e(b) and recognizing that "false information about a consumer is clearly inaccurate"

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under the Privacy Act even though he had suffered no injury other than emotional distress, and "the only indication of [his] emotional affliction was [his] conclusory allegations that he was 'torn ... all to pieces' and 'greatly concerned and worried' because of the disclosure of his Social Security number and its potentially 'devastating' consequences." *See id.* at 641 (Ginsburg, J., dissenting) (agreeing with the Court's holding recognizing Article III standing on this ground but criticizing the Court's holding that the plaintiff could not recover under the statute).

and interpreting the statute to also cover technically accurate material omissions); *Seamans v. Temple Univ.*, 744 F.3d 853, 865 (3d Cir. 2014) (similar).

Inaccurate credit information harms consumers regardless of whether the information is deemed "positive" or "negative." The time and effort required to correct falsely positive information is the same as that required to correct negative falsehoods. False "positive" information can make an individual appear dishonest—or even fraudulent—to a prospective lender or employer. And it is not uncommon for an employer to deny someone employment because she is perceived to be overqualified for the position. *See, e.g.*, Allison Green, *Why Employers Don't Want to Hire Overqualified Candidates*, U.S. News & World Report: On Careers Blog, July 31, 2013, http://money.usnews.com/money/blogs/outside-voices-careers/2013/07/31/why-employers-dont-want-to-hire-overqualified-candidates.

B. The Harms Congress Identified Are Similar to Those Redressed by Causes of Action at Common Law.

That a statutory cause of action is similar to actions available at the common law provides additional confirmation that FCRA actions are of the type traditionally resolved by courts. *Sprint Commc'ns*, 554 U.S. at 274 (stating that "[w]e have often said that history and tradition offer a meaningful guide to the types of cases that Article III empowers federal courts to consider" and examining common-law history of standing to bring assigned actions); *Vermont Agency*, 529 U.S. at 774 (the Court's conclusion that plaintiff had standing to bring *qui tam* action was "confirmed" by "the long tradition of *qui tam* actions in England and the American Colonies"); *see also Steel Co.*, 523

U.S. at 102 (Article III refers to "cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process"). Here, the right to accurate consumer reports protects interests similar to those that underlie common-law actions for defamation and invasion of privacy. And to the extent FCRA broadened the type of injury cognizable for standing purposes, it did so incrementally and constitutionally.

Congress explained that FCRA would seek to remedy harms related to the invasion of privacy and publication of inaccurate consumer information likely to cause reputational harm. *See supra* at 14-15 (discussing § 1681 and S. Rep. No. 91-517). These are just the sort of injuries that the common law has long recognized as actionable without proof of injury, and for which it presumes damages—that is, "a monetary award calculated without reference to specific harm." *Chao*, 540 U.S. at 621 & n.3 (citing Restatement (First) of Torts § 621, cmt. a, and § 867, cmt. d, for the proposition that presumed damages are available for defamation and privacy torts respectively, but holding statutory provision at issue eliminated the ability to recover presumed damages).

For instance, the "common law tort of invasion of privacy" created a remedy for "personal wrongs which result[ed] in injury to plaintiffs' feelings and [were] actionable even though the plaintiff suffered no pecuniary loss nor physical harm." *Parks v. IRS*, 618 F.2d 677, 683 (10th Cir. 1980); *see Pichler v. UNITE*, 542 F.3d 380, 398-99 (3d Cir. 2008) (recognizing same). And "courts for centuries have allowed juries to presume that some damage occurred from many defamatory utterances and publications." *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 760-61

(1985) (plurality opinion) (citing Restatement (First) of Torts § 568, cmt. b (1938)).

Similarly, Chief Justice Holt's dissenting opinion in *Ashby* recognized that deprivation of the right to vote, without more, constitutes injury, by relying in part on the established law of defamation, stating: "If words be spoken of a man whose reputation is so very intire that nobody believes the words, so that he loses nothing by them, yet because it is an injury to a man to be ill spoken of, he shall recover damages." *Ashby I*, 87 Eng. Rep. at 816. Chief Justice Holt's reasoning assumed there was no injury other than the false statement—not even reputational injury—and he did not draw a distinction based on the egregiousness of the defamatory statement. *Id.*

Another common-law case—one from shortly after the founding—allowed an action based in part on inaccurate credit information without a showing of separate harm. In *Marzetti v. Williams*, (1830) 109 Eng. Rep. 842 (K.B.) 842-43; 1 B. & AD. 415, the court allowed the plaintiff to bring an action against his bank for its inaccurate statement to the plaintiff's payee that the plaintiff had insufficient funds in his account to satisfy a check, although the bank cashed the check the following day. *See id.* Ultimately holding that nominal damages were allowed by analogizing the case to a breach of implied contract, Justice Taunton, writing seriatim, recognized that "[t]here are many instances where a wrong, by which the right of a party may be injured, is a good cause of action although no actual damage be sustained" and noted that under the case law, the probable damage where "the credit of the plaintiff was likely to be injured" by the inaccu-

rate statement, was sufficient injury to sustain the action. *See id.* at 846.

The law has long recognized—and expanded over time—protection for such interests at the intersection of property rights and the right to "an inviolate personality." *See* Samuel Warren and Louis Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193, 193, 205, 207 (1890) (recognizing "[that] the individual shall have full protection in person and in property is a principle as old as the common law; but it has been found necessary from time to time to define anew the exact nature and extent of such protection" and discussing the examples of defamation, assault, and the common-law action against unauthorized publication as early protections of the "right to one's personality"). And because these causes of action protect such an important—though intangible—thing as one's person, they do not require any showing of separate injury to be viable. *Cf. id.* at 198-99 & n.6 ("[The common-law action against unauthorized publication] does not turn upon the form or amount of mischief or advantage, loss or gain. The author of manuscripts, whether he is famous or obscure, low or high, has a right to say of them, if innocent, that whether interesting or dull, light or heavy, saleable or unsaleable, they shall not, without his consent, be published." (quoting *Prince Albert v. Strange*, (1849) 2 DeGex & Sm. 652, 694 (opinion of Knight Bruce, V.C.))).

Thus, the common law recognized adversary causes of action based on defamation, invasion of privacy, and similar torts without requiring proof of further injury beyond the offending action itself. Congress was well within its constitutional prerogative to create new legal rights actionable in the federal courts

similar in kind to cases "traditionally thought to be capable of resolution through the judicial process." *Raines v. Byrd*, 521 U.S. 811, 819 (1997) (quoting *Flast v. Cohen*, 392 U.S. 83, 97 (1968)).

C. Inaccurate Consumer Reporting Is a "Concrete Harm."

When Spokeo is forced to confront these strong common law traditions, it relies on tautology to confuse the point. Every example of an injury (no matter how ephemeral) that the common law recognized as sufficient for standing, Spokeo defines as "concrete" or harm to a "property right." Then, Spokeo crafts the rule that "[i]n the English legal tradition familiar to the Framers, a concrete harm was a necessary element of any judicial dispute—the violation of a legal right by itself did not suffice." Pet. Br. 20-21. Spokeo continues the circle by asserting that Robins's allegation of injury due to Spokeo's publication of inaccurate consumer information alleges violation of only intangible, legal rights provided under FCRA. *Ergo*, argues Spokeo, the injuries that Robins alleges and that FCRA targets are lacking.

First, Spokeo's dichotomy between "property" and "legal rights" ignores the Madisonian idea permeating the common-law cases and embraced by the founders that individuals have "a property in [their] rights." Madison, *Property*, at 266. For instance, Spokeo attempts to distinguish *Ashby* as "grounded in a cognizable concrete harm—the denial of the right to vote, which was viewed as a property right." Pet. Br. 25. Neither Chief Justice Holt's opinion nor the House of Lords Report on the case conducted an exegesis on property law and identified the right as a "property" right, as Spokeo's statement suggests. Instead, *Ashby*

relied on an "Act of Parliament," Stat. of *West.* 1 Cap. 5, to determine that the plaintiff had the right to vote and held that the defendants were prohibited from violating that right. *Ashby* Lords Rep. at 529; *see also id.* at 528 ("Thus the Right of Election is explained, and shewed to be a legal Right."). To the extent the House of Lords Report recognized that denying a judicial remedy to vindicate a legal right is "destructive of the Property" of the plaintiff and against the statutory right to "Freedom of Elections," *id.* at 534, the Report simply gave credence to the notion that "property" in its broader and "juster" sense, includes legal rights, Madison, *Property*, at 266; *see also supra* at 10-11 (discussing "property" interests created by statute).

Spokeo also suggests that this Court's opinion in *Coleman* robbed *Ashby* of all meaning when it stated that "'[p]rivate damage' is the clue to the famous ruling in *Ashby v. White*.'" Pet. Br. 25 (quoting *Coleman*, 307 U.S. at 469 (opinion of Frankfurter, J.)). However, *Coleman* used "private damage" to refer to the violation of an individual's legal right. *Coleman* distinguished *Ashby* because *Ashby* involved a private individual seeking to vindicate the violation of his legal rights, whereas *Coleman* held that state legislators suing in their official capacity did not have standing. *See Coleman*, 307 U.S. at 470 ("In no sense are [the issues here] matters of 'private damage.' They pertain to legislators not as individuals but as political representatives executing the legislative process."). The law courts were meant to vindicate personal legal rights. *See id.* at 469. *Coleman*'s distinction of *Ashby* therefore supports, rather than refutes, Robins's position.

Second, Spokeo concedes that the common-law courts provided for actions for trespass, copyright, and "actions based on loss of a bargain or breach of trust" without a separate showing of harm but distinguishes the actions as involving "[c]oncrete actual harm." Pet. Br. 26; *see also id.* at 21, 25, 48, 49. Under closer examination, these injuries are not inherently more "concrete" than the harm at issue here—inaccurate credit reporting.

Spokeo argues that trespass—even a one-time incursion with no damage done—is more "concrete" because "repeated acts of going over the land might be used as evidence of a title to do so, and thereby the right of the plaintiff may be injured." Pet. Br. 25-26 (quoting *Marzetti*, 109 Eng. Rep. at 846). However, a plaintiff in a trespass action need not allege or prove a real or imminent danger of repeated trespasses and thus no showing of the "concrete harm" Spokeo posits—likely legal effect on the plaintiff's land title—is required. Restatement (Second) of Torts § 163 & cmt. d (1965).

Moreover, *Marzetti* cited the trespass example in support of the general proposition that "[t]here are many instances where a wrong, by which the right of a party may be injured, is a good cause of action although no actual damage be sustained." *Marzetti*, 109 Eng. Rep. at 846 (opinion of Taunton, J.). The court extended that principle from trespass law to affirm a cause of action directly analogous to the one here—where "the credit of the plaintiff was likely to be in-

jured"—without suggesting that that injury was somehow dependent upon waiver principles. *See id.*[5]

Similarly, Spokeo's attempt to distinguish copyright actions as involving a "concrete 'property' interest" fails. Pet. Br. 49. Spokeo dismisses out of hand the fact that Congress since 1790 has provided for statutory damages for copyright infringement not dependent on any pecuniary or separate injury to the plaintiff. Indeed, the first U.S. Copyright Act assigned damages at a certain amount per infringing page. *See Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 351 (1998) (citing Copyright Act of 1790). It is well-established that federal courts have discretion to award statutory damages "[e]ven for uninjurious and unprofitable invasions of copyright." *F. W. Woolworth Co. v. Contemporary Arts, Inc.*, 344 U.S. 228, 233 (1952); *see* 4 Melville Nimmer & David Nimmer, *Nimmer on Copyright* § 13.01, at 13–6 (1999).

And Spokeo's distinction of breach-of-contract and breach-of-trust cases that did not involve pecuniary loss as involving a "[c]oncrete actual harm"—"the loss of the value of the special relationship"—does not bear scrutiny. Pet. Br. 26 (citing *Marzetti*, 109 Eng.

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[5] Spokeo also suggests that *Ashby* could be limited to causes of action that are deemed waived as a legal matter if no cause of action is brought within a certain timeframe or after repeated injuries. Pet. Br. 25 (citing Lord Raymond's reporting of *Ashby I*, (1703) 92 Eng. Rep. 126 (Q.B.) 136; 2 Ld. Raym. 938). What *Ashby* actually said was that if the court does not let a plaintiff vindicate a legal right—any legal right—the law "tolerates the Injury" and the plaintiff will no longer have that right because he cannot enforce it. *Ashby* Lords Rep. at 528; *see also Ashby I*, 92 Eng. Rep. 126, 136 ("If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it ....").

Rep. at 846, and *Keech v. Sanford*, (1726) 25 Eng. Rep. (Ch.) 223, 223-24; Sel. Cas. T. King 61). The loss of the "special relationship" Spokeo refers to boils down to the loss of a "relationship" recognized by contract or trust law—that is, the loss of a legal right. *See Marzetti*, 109 Eng. Rep. at 846 (opinion of Parke, J.) ("[W]herever there is a breach of contract or any injury to the right arising out of that contract, nominal damages are recoverable.").

Contrasting with these supposedly "concrete" harms, Spokeo portrays inaccurate consumer reporting as harmless. But there is nothing intuitively more "concretely" harmful about crossing the corner of your neighbor's yard—once, without disturbing the grass; about speaking ill of someone—when no one believes it, *Ashby I*, 87 Eng. Rep. at 816; about poking someone in the chest—when it didn't even hurt, Black's Law Dictionary (10th ed. 2014) (for the tort of "battery," "the slightest degree of force is sufficient, provided that it be applied in a hostile manner; as by pushing a man or spitting in his face" (quotation marks and citation omitted)); or about putting a copy of copyrighted genealogical research on a library shelf—with no indication that anyone looked at the research or would ever have bought a copy, *see Hotaling v. Church of Jesus Christ of Latter-Day Saints*, 118 F.3d 199, 203 (4th Cir. 1997).

Credit reputation is at least as concrete an interest as those vindicated by such traditional rights of action. A person's credit can legitimately be viewed as a highly valuable property right, an asset, even a new stratification of society in the digital age, and depreciation of that asset has quite "concrete" consequences. In 1968, sociologist David Caplovitz predicted:

> As our economy becomes more and more dependent upon credit, a man's credit rating becomes an increasingly important asset. A vast network of information exchange exists in the credit industry .... Automation has been introduced, and soon the credit rating system will be fully automated.
>
> How one achieves or loses status in this ranking system is by no means obvious....
>
> The pressure toward a probabilistic social index for determining credit ratings comes from the fact that such a procedure is easier to administer and fits more neatly into the computer age.

David Caplovitz, *Consumer Credit in the Affluent Society*, 33 Law & Contemp. Probs. 641, 649-50 (1968). Now Professor Caplovitz's vision of an Orwellian credit age dominated by massive databanks of consumer information cultivated and culled by computers has become reality: Careers, property, and livelihoods depend on the information collected and disseminated by computer databases; criminals steal the credit identities of others to enrich themselves; hackers may crash the credit worth of individuals in seconds; and companies sell products by the thousands to protect the valuable commodity that is the consumer's credit reputation. To say that accurate credit information is not valuable and that the dissemination of inaccurate credit information is not an injury is to ignore the modern framework of society. Perhaps the best indicator of the value society places on this consumer and credit information is that, in shorthand, we call it our "identity." *See, e.g.*, Black's Law Dictionary (10th ed. 2014) (defining "identity theft").

Once a credit reporting agency publishes inaccurate information about a consumer, the consumer may have no way of knowing if or when someone will access the information. Mark Twain's aphorism that "[o]ne of the most striking differences between a cat and a lie is that a cat has only nine lives," *Pudd'nhead Wilson's Calendar* (1894), seems woefully understated in an era when the internet can perpetuate false information about a consumer indefinitely. If the consumer must wait to sue until she actually applies for a loan or a new job, there will be insufficient time to correct the errors. Spokeo's claim that Congress cannot create an action for inaccurate consumer information because it is not a "concrete" harm or deprivation of a settled "property right" therefore fails as a matter of logic and law.

D. Congress May Choose the Means to Deter or Remedy the Harm It Identifies.

Once Congress, through FCRA, identified the harm of inaccurate consumer information, Congress was fully within its authority to provide for statutory damages to remedy that harm and the inadequate procedures that led to it. As this Court has long recognized, "'[h]ow to effectuate policy—the adaptation of means to legitimately sought ends—is one of the most intractable of legislative problems'"; the choice of remedy "'is a matter within the legislature's range of choice.'" *Laidlaw*, 528 U.S. at 187 (quoting *Tigner v. Texas*, 310 U.S. 141, 148 (1940)).

Both this Court and the common law have endorsed the idea that presumed or nominal damages are appropriate in cases where there is no physical or pecuniary injury and damages are difficult to prove or quantify. *See Chao*, 540 U.S. at 621 (but holding that

statute at issue eliminated availability of presumed damages). This is particularly true for privacy and defamation torts, which provide "quintessential example[s] of damages that are uncertain and possibly unmeasurable." *Kehoe v. Fidelity Bank & Trust*, 421 F.3d 1209, 1213 (11th Cir. 2005); *see Chao*, 540 U.S. at 621. Thus, Congress's choice of remedy and method of deterrence was rational and based on long-standing common-law traditions.

By providing for statutory damages, Congress ensured that a consumer has an incentive to bring suit to vindicate a violation of his statutory right—precisely because consequential or pecuniary damages may be small, uncertain, or unmeasurable. By doing so Congress did not create a mere "wager" contingent on the outcome of the suit or a "'byproduct' of the suit itself." *See Vermont Agency*, 529 U.S. at 772-73. Instead, the statutory damages are specifically tied to the harm that Congress sought to prevent—inaccurate credit reporting due to unreasonable procedures. Therefore, the FCRA plaintiff's interest in the suit is sufficiently related to his injury in fact—that is, his interest "consist[s] of obtaining compensation for, or preventing, the violation of a legally protected right." *Id.* at 772; *see Lujan*, 504 U.S. at 580 (Kennedy, J., concurring) (plaintiffs have standing based on a statutory violation where the statute "identif[ies] the injury it seeks to vindicate and relate[s] the injury to the class of persons entitled to bring suit").

Finally, although Robins also seeks injunctive relief, Spokeo apparently does not challenge his standing to do so: such relief is not even mentioned in its opening brief. But the natural consequence of

Spokeo's argument—that inaccurate consumer information is not sufficient injury for Article III standing—would doom FCRA plaintiffs' requests for injunctive relief just as surely as it would doom plaintiffs' statutory-damages claims.[6]

If inaccurate consumer reporting is not an injury for statutory-damages purposes, then it is not an injury for injunctive purposes either. Congress would be disabled from authorizing consumers to seek injunctions to correct false information in their credit reports under FCRA until actual damages were imminent. Consumers would have to wait until they could prove they were about to be denied credit or a job before they could seek a court order to correct the falsities.

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[6] The lower courts disagree as to whether private plaintiffs may obtain injunctive relief under FCRA. *See Andrews v. Trans Union Corp.*, 7 F. Supp. 2d 1056, 1083-84 (C.D. Cal. 1998) (FCRA allows injunction to correct inaccurate report), *rev'd on other grounds*, 225 F.3d 1063 (9th Cir. 2000), *and* 534 U.S. 19 (2001); *Greenway v. Info. Dynamics, Ltd.*, 399 F. Supp. 1092, 1096–98 (D. Ariz. 1974) (certifying class on claim for injunctive relief under FCRA and granting preliminary injunction); *see also Califano v. Yamasaki*, 442 U.S. 682, 705 (1979) ("Absent the clearest command to the contrary from Congress, federal courts retain their equitable power to issue injunctions in suits over which they have jurisdiction."). *But see Washington*, 199 F.3d at 269 (discussing split and holding injunction unavailable). However, whether injunctive relief is available is a question under Federal Rule of Civil Procedure 12(b)(6), not an issue of standing.

III. Recognizing That FCRA Plaintiffs Have Standing Based on Inaccurate Consumer Reports Poses No Separation-of-Powers Problem.

"The law of Art. III standing is built on a single basic idea—the idea of separation of powers" and, as such, "keeping the Judiciary's power within its proper constitutional sphere." *Raines*, 521 U.S. at 820. "At bottom, 'the gist of the question of standing' is whether petitioners have 'such a personal stake in the outcome of the controversy as to assure ... concrete adverseness ....'" *Massachusetts v. EPA*, 549 U.S. 497, 517 (2007) (citation omitted). FCRA plaintiffs have such a personal stake: They must personally be the subject of an inaccurate consumer report. And because of FCRA's statutory damages provision, they also have a monetary stake in the suit's outcome. This case therefore does not present the separation-of-powers concerns that have animated previous decisions of this Court.

The Court's jurisprudence recognizes that, generally, the "question whether the litigant is a 'proper party to request an adjudication of a particular issue,' is one within the power of Congress to determine." *Sierra Club v. Morton*, 405 U.S. 727, 732 n.3 (1972). It has identified two exceptions to this principle—statutes or causes of action that merit closer scrutiny—neither of which applies in this case. The first exception involves statutes that authorize private suits to challenge government action or inaction with respect to the regulation of third parties or the promulgation or execution of broad, generally applicable policies. *See generally, e.g.*, *Lujan*, 504 U.S. 555; *Sierra Club*, 405 U.S. 727. In those circumstances, a plaintiff

must demonstrate that the government's action or failure to act harmed him in some way beyond merely infringing an asserted interest in the government's obedience to the laws: "To permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an 'individual right' vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to 'take Care that the Laws be faithfully executed.'" *Lujan*, 504 U.S. at 577 (quoting U.S. Const. art. II, § 3).

The second, and related, exception involves constitutional or statutory rights that are common to all citizens, so that their violation affects all citizens equally—a so-called "generalized grievance." *See, e.g.*, *Richardson*, 418 U.S. at 176, 178. Under this exception, the Court has largely rejected standing where the plaintiff can show no separate harm to his interests other than his general interest as a taxpayer or citizen. Thus, this Court has held that plaintiffs had no standing as taxpayers or citizens to seek an accounting of CIA expenditures, *id.*, to challenge the reserve status of members of Congress as a violation of the Incompatibility Clause, *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 220-23 (1974), or to challenge the constitutionality of presidential appointments, *Ex parte Levitt*, 302 U.S. 633, 633-36 (1937) (per curiam).

These two exceptions, articulated in cases concerning standing to challenge governmental actions, recognize that "where large numbers of Americans suffer alike, the political process, rather than the judicial process, may provide the more appropriate remedy for

a widely shared grievance." *FEC v. Akins*, 524 U.S. 11, 23 (1998). The majoritarian political branches are better equipped to protect such broadly shared interests than the anti-majoritarian judicial branch. *See id.*

These separation-of-powers concerns are not implicated here, however. Unlike in *Lujan* or *Sierra Club*, Robins is not challenging executive action or inaction, where separation-of-powers concerns would be at their apex. *See Raines*, 521 U.S. at 819-20 ("[O]ur standing inquiry has been especially rigorous when reaching the merits of the dispute would force us to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional."). For instance, in *Lujan*, the plaintiffs sought to require two executive-branch agencies to consult about foreign development projects. Unlike those executive-branch agencies, Spokeo and other consumer reporting agencies have no duty to ensure that the laws are faithfully executed and can make no claim to co-equal constitutional status with the federal courts.

And contrary to Spokeo's argument, Congress is not required to task the executive branch with civil or criminal enforcement of every law it passes. Pet. Br. 27-31 (second-guessing Congress's choice of means for enforcing FCRA because "[p]rivate plaintiffs hunting for a bounty—and their lawyers—lack the political and legal constraints that cabin the executive's discretion"). As this Court has held, it is *Congress's* prerogative to choose the means that it thinks will best effectuate its policies, and "it is reasonable for Congress to conclude that an actual award of civil [damages] does in fact bring with it a significant quantum of deterrence over and above [the threat of possible gov-

ernment enforcement]." *Laidlaw*, 528 U.S. at 186 (discussing civil-penalty actions brought by private plaintiffs). Spokeo's proposed rule would be a radical departure from Congress's current practice and would weaken Congress's ability to protect consumers' interests.

FCRA also does not make a "generalized grievance" actionable. Instead, it specifically grants an *individual* legal right to accurate consumer information and provides statutory damages *only* if the particular plaintiff's legal right is violated—that is, if a consumer reporting agency willfully fails to comply with FCRA requirements "*with respect to any consumer*." § 1681n(a) (emphasis added); *see Beaudry v. TeleCheck Servs.*, 579 F.3d 702, 707 (6th Cir. 2009) (FCRA "does not authorize suits by members of the public at large; it creates an individual right not to have unlawful practices occur with respect to one's own credit information." (quotation marks and citations omitted)).

In this case, for instance, Robins has a right of action because he has pleaded that Spokeo willfully failed to use reasonable procedures, which led to Spokeo's publication of an inaccurate consumer report *about him*. He has alleged that he personally was the subject of an inaccurate credit report, and as such, has provided all the concrete particularity needed to resolve the legal dispute. *See Washington*, 199 F.3d at 267 n.3 (recognizing that "[c]ourts applying § 1681e(b) uniformly limit recovery to cases where the failure to follow procedures causes actual harm (*i.e.*, release of an inaccurate report) to the consumer" and citing cases).

Because this case presents no separation-of-powers concern and falls within Congress's broad authority to create private causes of action to deter and remedy violations of legal rights, rejecting standing in this case would not provide a bulwark against the Judiciary's intrusion upon the powers of its co-equal branches. Instead, it would diminish the constitutionally recognized powers of Congress and undermine the separation-of-powers purposes of the doctrine of Article III standing.

CONCLUSION

The Court should affirm the judgment of the court of appeals.

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REPLY BRIEF

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SPOKEO, INC.,
Petitioner,

v.

THOMAS ROBINS, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF PUBLIC JUSTICE, P.C., THE NATIONAL ASSOCIATION OF CONSUMER ADVOCATES, THE NATIONAL CONSUMER LAW CENTER, THE IMPACT FUND, AND THE SOUTHERN COALITION FOR SOCIAL JUSTICE AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF INTEREST 1

INTRODUCTION AND SUMMARY OF ARGUMENT 6

ARGUMENT 10

LAWSUITS BROUGHT AGAINST CONSUMER REPORTING AGENCIES ADDRESS REAL HARMS 10

A. As in Other Consumer-Protection Statutes, the FCRA's Statutory Damages Provisions Provide for Recovery Where Monetary or Other Harm Is Difficult to Quantify 10

B. Class Actions Brought Against Consumer Reporting Agencies for Informational Notice Violations and Systemic Inaccuracies Reflect Real-World Harm to Consumers 12

1. Trans Union's inaccurate reporting that the consumer was on the terrorist watch list, and withholding of the disclosure that it was doing so 13

2. Reporting agency refusal to reveal the actual sources of the information they report 16

3. Employment reporting agency refusal to either maintain "strict procedures" designed to ensure that criminal background checks are "complete and up to date" or to provide contmeporaneous notice to consumers that it is furnishing a report.....19

4. Consumer reporting agency refusal to update credit reports to show that various collections, judgments, or charged off accounts were no longer owed and were discharged in bankruptcy. 24

5. Consumer reporting agency refusal to report account credit limits where it impacts consumer credit scores. 25

6. Consumer reporting agency refusal to provide consumers with a legally mandated copy of their consumer file. 27

CONCLUSION.....29

TABLE OF AUTHORITIES

CASES

Ashby v. Farmers Insurance Co. of Oregon,
No. 01-CV-1446-BR, 2009 WL 32612925
(D. Ore. Sept. 30, 2009) 12

Cortez v. Trans Union, LLC,
617 F.3d 688 (3d Cir. 2010) 15

Crabill v. Trans Union, L.L.C.,
259 F.3d 662 (7th Cir. 2001).....7

Dalton v. Capital Assoicated Industries, Inc.,
257 F.3d 409 (4th Cir. 2001).....11, 20

Dreher v. Experian Information Solutions, Inc.,
71 F. Supp. 3d 572 (E.D. Va. 2014).....18

Gregan v. Garner,
498 U.S. 279 (1991).....24

Hilson v. Kelly Services, Inc.,
No. 2:15-cv-10803 (E.D. Mich. July 15,
2015), Doc. 29.....16

Larson v. Trans Union, LLC,
No. 3:12-cv-05726 (N.D. Cal. June 22,
2015), Doc. 184 16

Meyer v. National Tenant Network, Inc.,
10 F. Supp. 3d 1096 (N.D. Cal. 2014).....27, 28

Murray v. GMAC Mortgage Corp.,
434 F.3d 948 (7th Cir. 2006).....11

Patel v. Trans Union, LLC,
No. 3:14-cv-00522 (N.D. Cal. Sept. 3,
2015), Doc. 116.....16

Ramirez v. Trans Union, LLC,
301 F.R.D. 408 (N.D. Cal. 2014).....13, 14

Ramirez v. Trans Union, LLC,
No. 3:12-cv-632 (N.D. Cal. June 22, 2015), Doc. 184 16

Ryals v. Strategic Screening Solutions, Inc.,
No. 3:14CV643, 2015 WL 4606168 (E.D. Va. July 30, 2015) 20-21

Safeco Insurance Company of America v. Burr,
551 U.S. 47 (2007) 12

Stone v. Sterling Infosystems, Inc.,
No. 2:15-cv-00711 (E.D. Cal. July 29, 2015), Doc. 26 16

STATUTES

15 U.S.C. § 1601, *et seq.* 1

15 U.S.C. §§ 1601-1667(f) 1-2

15 U.S.C. §§ 1679-1679(j) 2

15 U.S.C. § 1681 ..... 10, 11

15 U.S.C. § 1681(a)(1) 8

15 U.S.C. § 1681b(b)(3)(A) 8

15 U.S.C. § 1681b(b)(4) 8

15 U.S.C. § 1681d(a) 8

15 U.S.C. § 1681e(b) 8, 22

15 U.S.C. § 1681e(c) 27

15 U.S.C. § 1681e(c)(a) 22

15 U.S.C. § 1681g 8

15 U.S.C. § 1681h 8

15 U.S.C. § 1681i(a) 20

15 U.S.C. § 1681k(a) 21

15 U.S.C. § 1681k(a)(1) 8

15 U.S.C. § 1681k(a)(2) 22

15 U.S.C. § 1681m(a) 8

15 U.S.C. § 1681n(a)(1)(A) 9

15 U.S.C. § 1681o 13

15 U.S.C. §§ 1691-1691f 2

15 U.S.C. §§ 1692-1692p 2

Consumer Credit Reporting Reform Act of 1996, P.L. 104-208 11

LEGISLATIVE HISTORY

115 Cong. Rec. 2414 (1969) 8

OTHER AUTHORITIES

Complaint, *Dennis v. Trans Union, LLC*, No. 2:14-cv-02865 (E.D. Penn. May 20, 2014), Doc. 1 ..... 16-17, 17

Frenzel, Lawrence D., *Fair Credit Reporting Act: The Case for Revision*, 10 Loy. L.A. L. Rev. 409 (1977) 9

Klein, Gary & Kavanaugh, Shennan, *Causes of the Subprime Foreclosure Crisis and the Availability of Class Action Responses*, 2 Ne. U. L.J. 111 (2010) 26

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National Consumer Law Center, Broken Records: How Errors by Criminal Background Checking Companies Harm Workers and Businesses (2012), *available at* http://www.nclc.org/images/pdf/pr-reports/broken-records-report.pdf.....22

Plaintiffs' Memorandum in Support of Motion for Class Certification and Approval of Class Counsel, *Roe v. IntelliCorp Records, Inc.*, 1:12-cv-02288-JG (N.D. Ohio Feb. 18, 2013), Doc. 79-1.....21

Restatement (2d) of Torts, §§ 570-574 15

Roberts, Dorothy E., *The Social and Moral Costs of Mass Incarceration in African American Communities*, 56 Stan. L. Rev. 1271 (2004) 23

Third Amended Complaint, *Meyer v. National Tenant Network, Inc.*, No. 3:13-cv-03187-JSC (N.D. Cal. Mar. 21, 2014), Doc. 50 27

STATEMENT OF INTEREST

Petitioner Spokeo, Inc. and its amici suggest that Fair Credit Reporting Act (FCRA) cases generally present little or no harm to consumers, who they argue thus lack standing and deserve no remedy. Further, they argue, class actions brought for violations of the statute are "abusive."[1]

Amici are legal advocacy groups that represent consumers and employees and advocate for robust enforcement of and remedies for violations of civil and statutory rights. Amici submit this brief to combat the misleading description of FCRA cases by Spokeo and its amici, and amici explain the real-world harm that individuals suffer when their FCRA rights are violated, notwithstanding the difficulty of proving a quantifiable loss. FCRA class actions remain the most important means to prevent and end those real world harms. Amici urge the Court to ensure that any standard of "injury" it adopts is broad enough to encompass the diverse harms illustrated by the cases discussed here.[2]

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[1] No counsel for a party authored any part of this brief and no counsel or party made a monetary contribution intended to fund the preparation or submission of the brief. Only the amici and their attorneys have paid for the filing and submission of this brief. Pursuant to Rule 37.3(a), all parties consented to the filing of this brief.

[2] Spokeo's novel standing challenge to FCRA causes of action implicates other statutes enacted and commonly referred to collectively with the FCRA as the Consumer Credit Protection Act, 15 U.S.C. § 1601, *et seq.* This group of laws was enacted over forty years ago and the legal remedies available for their violation—including statutory damages even absent proof of actual damages—have been solidified and defined over that period. *See, e.g.*, Truth in Lending Act, 15 U.S.C. §§ 1601

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Public Justice, P.C.

Public Justice, P.C. is a national public interest law firm dedicated to pursuing justice for the victims of corporate and governmental abuses. It specializes in precedent-setting and socially significant cases designed to advance consumers' and victims' rights, civil rights and civil liberties, occupational health and employees' rights, the preservation and improvement of the civil justice system, and the protection of the poor and the powerless. Public Justice regularly represents employees and consumers in class actions, and its experience is that the class action device is often the only meaningful way that individuals can vindicate important legal rights.

The National Association of Consumer Advocates

The National Association of Consumer Advocates (NACA) is a non-profit association of attorneys and consumer advocates committed to representing consumers' interests. Its members are private and public sector attorneys, legal services attorneys, law professors, and law students whose primary focus is the protection and representation of consumers. NACA's mission is to promote justice for all consumers by maintaining a forum for communication, networking, and information-sharing among consumer advocates across the

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to 1667(f), Credit Repair Organizations Act, 15 U.S.C. §§ 1679 to 1679(j), Equal Credit Opportunity Act, 15 U.S.C. §§ 1691 to 1691f, Fair Debt Collections Practice Act, 15 U.S.C. §§ 1692 to 1692p. Amici also represent consumers protected by these statutes.

country, particularly regarding legal issues, and by serving as a voice for its members and consumers in the ongoing struggle to curb unfair or abusive business practices that affect consumers.

NACA was founded in 1994 by 12 pioneering consumer attorneys who saw a need to link advocates working in all disciplines of consumer law to effectively create a fair, honest, and open consumer marketplace. Today, NACA has grown into an organization of more than 1,800 attorneys who represent and have represented hundreds of thousands of consumers victimized by fraudulent, abusive, and predatory business practices. As a national organization fully committed to promoting justice for consumers, NACA's members and their clients are actively engaged in promoting a fair and open marketplace that forcefully protects the rights of consumers, particularly those of modest means. In pursuit of this mission, making certain that corporations comply with state and federal consumer protection laws in general and the FCRA in particular has been a continuing and significant concern of NACA since its inception.

The National Consumer Law Center

The National Consumer Law Center, Inc. (NCLC) is a national, non-profit Massachusetts corporation specializing in consumer law, with historical emphasis on consumer credit. NCLC is recognized nationally as an expert in consumer credit issues, including fair credit reporting, and has drawn on this expertise to provide information, legal research, policy analyses, and market insights to federal and state legislatures, administrative agencies, and the courts for over 46 years. NCLC is the author of the Consumer Credit and Sales Legal Practice Series,

consisting of twenty practice treatises and annual supplements. One volume, Fair Credit Reporting Act (8th ed. 2013), is a standard resource on privacy and the FCRA. In addition, NCLC has testified before Congress regarding the FCRA, regularly submits comments to regulators in FCRA rulemakings, and has issued special reports on consumer reporting issues.

The Impact Fund

The Impact Fund is a non-profit foundation that provides funding, training, and co-counsel to public interest litigators across the country. It is a California State Bar Legal Services Trust Fund Support Center, providing services to legal services projects across California. The Impact Fund is counsel in a number of major civil rights class actions, including cases challenging employment discrimination, lack of access for those with disabilities, and violations of fair housing laws.

The Southern Coalition for Social Justice

The Southern Coalition for Social Justice (SCSJ) is a 501(c)3 nonprofit organization founded in August 2007 in Durham, North Carolina, by a multidisciplinary group, predominantly people of color, who believe that families and communities engaged in social justice struggles need a team of lawyers, social scientists, community organizers and media specialists to support them in their efforts to dismantle structural racism and oppression. Through its Criminal Justice Initiative, the SCSJ tackles racial discrimination at the legal and policy levels to eliminate obstacles facing those with criminal records as they attempt to re-enter the mainstream of society.

The SCSJ provides direct reentry legal services and referrals (in the NC Triangle and Triad areas) to clients seeking to expunge their criminal records and obtain certificates of relief. Through this clinic, the SCSJ witnesses, firsthand, how Fair Credit Reporting Act violations undermine its clients' attempts to obtain meaningful employment and a better life for their families.

INTRODUCTION AND SUMMARY OF ARGUMENT

Fair Credit Reporting Act (FCRA) class actions seeking statutory damages are brought to address real-world harm to consumers caused by willful and systemic violation of the statute by consumer reporting agencies and other governed parties. Again and again, reporting agencies, including Spokeo's amici, have been found to have knowingly or recklessly violated established law requiring the maintenance of procedures to ensure consumer reports are maximally accurate, current and complete, or requirements that consumers receive disclosures, alerts, and notices Congress has determined to have real-world value. A balanced look at the actual body of the FCRA class actions that have survived the arduous obstacles of litigation—even those misleadingly characterized as "abusive" by Spokeo's amici—demonstrates the real-world harms that violations of the FCRA have on consumers.

It makes sense that Congress decided to permit these types of statutory damage claims to go forward. Where a statutory violation will cause financial harm or other harm to consumers, but the extent of that harm would be difficult or burdensome to prove in individual cases, Congress has often permitted plaintiffs to sue for statutory damages without proof of pecuniary harm. Consumer-protection statutes, including the FCRA, regularly fit this description. Because proving monetary damages can cost more than the harm suffered, few consumers would accept this cost if recoveries were limited to proven monetary losses.

With this concern in mind, Congress has long included statutory damages provisions in consumer protection statutes. "Many statutes, notably consumer-protection statutes, authorize the award of damages (called 'statutory damages') for violations that cause so little measurable injury that the cost of proving up damages would exceed the damages themselves, making the right to sue nugatory." *Crabill v. Trans Union, L.L.C.*, 259 F.3d 662, 665 (7th Cir. 2001). Such statutes create legally protected interests and thus confer standing on a consumer who is injured by participation in a transaction tainted by a statutory violation.

As Congress recognized, lawsuits seeking to enforce the FCRA's important accuracy, privacy, and informational notice provisions have meaningful tangible consequences for consumers and are necessary to protect consumers' ability to obtain the basic credit, employment, and housing necessities the statute was designed to address. If enforced, the FCRA's requirements protect the security of consumers' private information and ensure that consumer reports, which often determine consumer eligibility to everything from a mortgage and insurance to license and employment eligibility, are accurate. The harms averted and corrected by lawsuits brought to enforce rights provided by the FCRA are real and concrete. And that is true even when those harms are not easily quantifiable or cannot be proven in the rigors of litigation.

It is true that not all FCRA plaintiffs will have yet lost a job, been rejected for a loan, or been turned down for an apartment because of inaccurate information in their consumer files. And of course not every consumer whose private information is

unlawfully sold will suffer quantified harms of identity theft. But for many of them, it is simply a matter of time. Class actions to stop systemic errors are important because they can prevent the violation at issue from leading to the larger harms, the sort of harms Spokeo's amici demand as the admission to FCRA litigation.

Prior to the FCRA, increasing quantities of personal information were exchanged electronically with virtually no regulation. This resulted in frequent inaccuracies in consumer reports. 115 Cong. Rec. 2414 (1969). The frequency of inaccurate information was particularly problematic because of the outsize power consumer reports wield over consumers' daily lives: They often determine whether a consumer can get a job, obtain a mortgage, or qualify for a credit card. In 1970, Congress passed the FCRA with the goal of "fair and accurate" consumer reporting. 15 U.S.C. § 1681(a)(1). At the heart of the new statute's focus on accuracy was its requirement that consumer reporting agencies to "follow reasonable procedures to assure maximum possible accuracy." 15 U.S.C. § 1681e(b). In order to ensure consumers are able police the accuracy of their reports, the FCRA also contains a variety of provisions requiring notice and disclosures. *E.g.*, 15 U.S.C. § 1681b(b)(3)(A) (establishing pre-adverse employment action notice requirement); § 1681b(4)(B) (requiring notification of national security investigation); § 1681d(a) (requiring disclosure of investigative report); § 1681g (requiring full file disclosure to consumers); § 1681h (setting forth form and conditions of disclosure); § 1681k(a)(1) (requiring disclosure regarding the use of public record information); § 1681m(a) (requiring notice of adverse action based on consumer report).

However, with only an actual damages remedy initially available, the FCRA's protections were difficult to enforce. Lawrence D. Frenzel, *Fair Credit Reporting Act: The Case for Revision*, 10 Loy. L.A. L. Rev. 409, 429-30 (1977). Though inaccuracies and notice violations cause real harms—as the cases discussed below demonstrate—these harms were difficult to prove in litigation, and litigation often resulted in only nominal monetary damages. *Id.* The result? Reporting agencies made a rational economic decision to flout the law because it was cheaper for them to pay damage awards in litigation than to fully comply. To address such deliberate violations of the FCRA, Congress added a provision allowing for small statutory damages, but still imposed the substantial limitation that it only be available in circumstances where consumers could prove that an FCRA violation was "willful." 15 U.S.C. § 1681n(a)(1)(A).

Given that the requirements of the FCRA are designed to be systematic and that the statutory damages available under the act are modest ($100-$1000 per violation), class actions have become one of the primary methods through which compliance has been compelled. Individual consumer claims for hard-to-prove actual damages or small statutory damages are both unlikely to be brought in the first instance and, more importantly, are unlikely to persuade sophisticated, large corporate reporting agencies to comply with the law. But, where many consumers are subject to the same violations, and where the reporting agencies' violations are willful, those consumers' rights can be vindicated in a class action seeking statutory damages for each member of the class. Faced with the threat of substantial class-wide damages, consumer reporting agencies

are encouraged to, and in fact do, make changes to achieve the FCRA's goal: ensuring accurate reporting.

Not only do FCRA class actions play an important role in ensuring a fair and accurate consumer reporting system, but, contrary to the assertions of Spokeo's amici, they are also rooted in the real harms caused by inaccurate reports and notice violations. Below, the amicus brief discusses several widespread FCRA violations and the real-world impact those violations have on consumers. The brief also discusses how FCRA class actions—including those labeled as "abusive" by Spokeo's amici—address and attempt to correct those real-world harms. None of the consumer reporting agency cases cited by Spokeo's amici as "abusive" actually fit that description.

ARGUMENT

LAWSUITS BROUGHT AGAINST CONSUMER REPORTING AGENCIES ADDRESS REAL HARMS.

A. As in Other Consumer-Protection Statutes, the FCRA's Statutory Damages Provisions Provide for Recovery Where Monetary or Other Harm Is Difficult to Quantify.

In enacting the FCRA, Congress sought to alleviate the real harms done to consumers by inaccurate consumer reports. Congress found that modern consumer reporting had developed into an "elaborate mechanism" for "investigating and evaluating the credit worthiness, credit standing, credit capacity, character, and general reputation of consumers. 15 U.S.C. § 1681. Because "[i]naccurate credit reports directly impair the efficiency of the

banking system" and "unfair credit reporting methods" harmed "public confidence which is essential to the continued functioning of the banking system," there was "a need to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy." *Id.* "As Representative Sullivan remarked, 'with the trend toward the establishment of all sorts of computerized data banks, the individual is in great danger of having his life and character reduced to impersonal 'blips' and key-punch holes in a stolid and unthinking machine which can literally ruin his reputation without cause, and make him unemployable.' 116 Cong. Rec. 36570 (1970)." *Dalton v. Capital Associated Indus., Inc.*, 257 F.3d 409, 414 (4th Cir. 2001).

And yet, between 1970 and 1996, these legislative objectives of accuracy, information, and privacy remained unfulfilled. In 1996, Congress amended the FCRA to provide consumers with a right of action for statutory damages that is not dependent on a showing of actual monetary loss. Consumer Credit Reporting Reform Act of 1996 (Public Law 104-208, the Omnibus Consolidated Appropriations Act for Fiscal Year 1997, Title II, Subtitle D, Chapter 1). Congress created this remedial scheme because "individual losses" are "likely to be small—a modest concern about privacy, a slight chance that information would leak out and lead to identity theft." *Murray v. GMAC Mortgage Corp.*, 434 F.3d 948, 953 (7th Cir. 2006). Statutory damages are an integral part of Congress' effort to provide consumers with a practical remedy that will serve values of both deterrence and compensation.

B. Class Actions Brought Against Consumer Reporting Agencies for Informational Notice Violations and Systemic Inaccuracies Reflect Real-World Harm to Consumers.

Unsurprisingly, the consumer reporting agencies and credit reporting users subject to the restrictions Congress imposed in the FCRA are critical of efforts to enforce these provisions, referring to them as abusive or extortive. However, even the cases cited by Spokeo's amici as "abusive" involve real harms. By the account of Spokeo and its amici, the small subset of consumer class actions that have been brought and survived summary judgment and class certification were unjust, unnecessary, and abusive. But if such an action survived motions practice, there was a reason. District courts are not blind to the merits of a claim or the importance of a remedy sought, even if actual damages could not be quantified or proved. Spokeo's amici's attempts to paint these claims as "abusive" are attempts to relitigate those issues.

In addition to the practical reality that an "abusive" action is unlikely to be permitted to proceed in the district court, there are significant defenses on the merits to these cases. Most importantly, a consumer must prove that a violation was "willful." *See, e.g.*, *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47 (2007); *Ashby v. Farmers Ins. Co. of Ore.*, No. 01-CV-1446-BR, 2009 WL 3261925, at *2 (D. Ore. Sept. 30, 2009) (jury found violation not willful). In this case, for example, it is possible that Spokeo will prevail on the basis that its actions were not "willful" regardless of the outcome of this appeal. To the extent a consumer reporting agency's conduct was merely negligent, no statutory damages are

available, and only actual damages may be obtained. 15 U.S.C. § 1681o. The fact that statutory damages are only available in cases involving willful misconduct is a significant bulwark against frivolous actions and appropriately calibrates the burden of compliance; where consumer reporting agencies know they are breaking the law, or are reckless with respect to their legal obligations, they face potentially stiff penalties. But where their conduct is merely negligent, their liability is limited to the actual harm that can be proven.

Contrary to the characterizations by Spokeo's amici, there has never been a problem of "class action lawyers" driving a wave of abusive FCRA cases without existing judicial remedy to prevent such misconduct. In each case and instance attacked by Spokeo's amici, these precepts have been true. A more complete account of some of the "abusive" cases offered by Spokeo's amici confirms this reality.

1. **Trans Union's inaccurate reporting that the consumer was on the terrorist watch list, and withholding of the disclosure that it was doing so.**

   Ramirez v. Trans Union, LLC.

Spokeo amicus Trans Union routinely sold consumer reports that inaccurately label consumers as terrorists. Specifically, it purported to provide information on whether a given consumer is on the U.S. Treasury Department's Office of Foreign Assets Control's list. This list is meant to track whether the consumer is a suspected terrorist. *Ramirez v. Trans Union, LLC*, 301 F.R.D. 408, 413-15 (N.D. Cal. 2014). Trans Union's procedure for determining whether a given individual was on the list, however, was far from a reasonable procedure designed to

ensure maximum accuracy: Trans Union matched consumers to the list based only on the consumers' names, without requiring any further verification that the consumer who is the subject of the report is the same person who is on the government's list. *Id.* at 414. As a result, Sergio Ramirez and thousands of other consumers were falsely labeled by Trans Union as terrorists.

When Mr. Ramirez sought to buy a car on credit, the Trans Union report that the dealership obtained incorrectly matched Mr. Ramirez (by name alone) to the terrorist list. *Id.* Because the dealership noticed that the birthdates of the individuals on the terrorist list did not match Mr. Ramirez's birthdate, the dealership agreed to go forward with the transaction, but advised that the car had to be put only in the name of Mr. Ramirez's wife. The Ramirezes complied with that request. *Id.* at 415.

The next day, Mr. Ramirez requested a copy of his report from Trans Union, but the report Trans Union sent him in response did not contain such an alert. *Id.* Mr. Ramirez then brought a class-action suit on behalf of himself and others who had also inaccurately been labeled terrorists based on Trans Union's flawed name-only matching system. The case seeks to recover statutory damages on behalf of those Trans Union has falsely labeled terrorists. *Id.* at 413. Importantly, because Trans Union fails to include the fact that it has labeled someone as a terrorist from the disclosures it makes to consumers who request their credit report, many class members may not know they are being falsely labeled as terrorists until it is too late.

Trans Union had been well aware of the inaccuracies resulting from its inadequate terrorist

matching procedures for years, yet was apparently unmotivated to correct the problem. Years before *Ramirez*, Trans Union was sued individually by Sandra Cortez, who was also falsely labeled as a terrorist by Trans Union. *Cortez v. Trans Union, LLC*, 617 F.3d 688, 697 (3d Cir. 2010). Like Mr. Ramirez, Ms. Cortez attempted to buy a car. She went to the car dealership armed with the exemplary Trans Union credit report she had requested from the agency. *Id.* But unlike Mr. Ramirez, Ms. Cortez suffered pecuniary damages by being held at the car dealership for several hours.

Under Spokeo's view of standing law, however, Mr. Ramirez and class members in his case lack standing to bring suit. Unlike in *Cortez*, they did not suffer any quantifiable harm. Mr. Ramirez acted and brought suit before he had suffered actual damages to the degree necessary to satisfy Spokeo. But even in spite of the lack of quantifiable harm, consumers were injured by the publication of demonstrably false information about them. Trans Union falsely published that they were terrorists on government watch lists, the type of libelous speech that has always been found to be injurious under common law, and able to recover nominal damages regardless of monetary loss. *See* Restatement (2d) of Torts, §§ 570-574 (a statement is defamatory per se when it falsely imputes a criminal offense to the plaintiff).

Ramirez is exactly the type of case that could be impacted by a no-standing ruling here. After this Court granted review in *Spokeo*, the district court stayed the case pending this Court's decision.

Ramirez v. Trans Union, LLC, No. 3:12-cv-632 (N.D. Cal. June 22, 2015), Doc. 184.[3]

2. Reporting agency refusal to reveal the actual sources of the information they report.

a. Dennis v. Trans Union, LLC.

Dennis v. Trans Union, LLC is another example of how consumers can suffer redressible injury when they are deprived of statutory rights that Spokeo's amici characterize as merely "technical." *Dennis* involved a violation of § 1681g(a)(2), which requires that a consumer reporting agency to "clearly and accurately disclose to the consumer [t]he sources of the information." This requirement is critical to the FCRA's purpose of ensuring that consumer reports are accurate, because consumers are powerless to stop the dissemination of inaccurate information unless they can determine its source.

In 2012, Deidre Dennis sought a mortgage loan to purchase a home, but she was unable to close on the loan because her Trans Union credit report erroneously reported that she still owed a $33,194 tax lien (the lien, which was actually for a much small amount, had been paid years earlier). Compl. at 5, *Dennis v. Trans Union, LLC*, No. 2:14-cv-02865

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[3] *Ramirez* is not the only FCRA case that has been stayed pending this Court's decision in *Spokeo*. *E.g.*, *Patel v. Trans Union, LLC*, No. 3:14-cv-00522 (N.D. Cal. Sept. 3, 2015), Doc. 116 (also involving Trans Union falsely labeling the individual a terrorist); *Stone v. Sterling Infosystems, Inc.*, No. 2:15-cv-00711 (E.D. Cal. July 29, 2015), Doc. 26; *Hilson v. Kelly Servs., Inc.*, No. 2:15-cv-10803 (E.D. Mich. July 15, 2015), Doc. 29; *Larson v. Trans Union, LLC*, No. 3:12-cv-05726 (N.D. Cal. June 22, 2015), Doc. 184.

(E.D. Penn. May 20, 2014), Doc. 1. The reports that Ms. Dennis received and disputed stated that the source of the tax lien information was the "Albany County Clerk" in Albany, New York, which, in fact, was *not* the source of Trans Union's erroneous information—it obtains its "public records" from a private third party. *Id.* at 4. After Trans Union (mis)represented that it had "verified" the accuracy of the lien with its source, Ms. Dennis contacted the New York tax authorities, who advised her that the Albany clerk's records (correctly) showed only a satisfied lien and in a much smaller amount. *Id.* at 5. Thus, because Trans Union misrepresented the source of its information, Ms. Dennis was both unable to correct her credit report with Trans Union, and unable to correct the inaccurate information at its source. There is no question that Ms. Dennis suffered an injury—the denial of a mortgage loan. But what if she had checked her Trans Union report prior to applying for mortgages? Should Ms. Dennis have been required to apply for a loan and be rejected before she was entitled to bring suit against Trans Union?

According to Spokeo, yes. In Spokeo's view, even when a consumer knows that a reporting agency is publishing false information about her for profit in violation of the FCRA—information that is frequently the gatekeeper to credit, housing, and employment opportunities—she may not seek to enforce her rights until it is too late.

b. Dreher v. Experian Information Solutions, Inc.

According to Spokeo's amici, *Dreher v. Experian Information Solutions, Inc.* is another prime example of an abusive lawsuit brought on the basis of a

technical violation that has not done anyone any real harm. Br. for Experian Info. Solutions, Inc. as Amicus Curiae Supporting Pet., at 9-10 (Experian Br.). A look at the actual case reveals a very different picture. In fact, amici Experian suffered summary judgment in favor of the plaintiff and ultimately stipulated that a jury would award statutory damages.[4]

In November 2010, Michael Dreher was subject to a federal background check in order to receive a security clearance. *Dreher*, 71 F. Supp. 3d at 575. Much to Mr. Dreher's surprise, the investigator uncovered a delinquent credit card account on Mr. Dreher's Experian credit report for a credit card Mr. Dreher had never taken out. *Id.* In an attempt to save his clearance, Mr. Dreher obtained a copy of his Experian report and saw that the delinquent account was listed as being reported by "Advanta Credit Cards." *Id.* But Advanta had been closed by regulators and no longer existed. Instead, the account information was actually being reported by an undisclosed company called CardWorks. *Id.* at 576. Mr. Dreher sued Experian under § 1681g(a)(2) for failing to accurately disclose the sources of information contained in its reports.

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[4] In its amicus brief, Experian claims that the district court found that "[i]t is difficult to see how anyone suffered any injury from Experian's error." But Experian made the same argument to the district court itself, which made clear that Experian's characterization of its earlier statement was misleading, explaining that Experian had "pounced on a statement by the Court in its opinion certifying the class in this action." *Dreher v. Experian Info. Solutions, Inc.*, 71 F. Supp. 3d 572, 577 (E.D. Va. 2014).

Because of Experian's misrepresentation, there was no way for consumers to know how to correct their reports. Just as with *Dennis*, the problem here is that, without the correct source information, a consumer—such as Mr. Dreher, an identity theft victim trying to correct his credit report—cannot know where to turn to correct inaccurate information.

While Mr. Dreher was harmed by the inclusion of inaccurate information in his report, his cause of action was not the proximate cause of the harm—by the time he requested his disclosure, the pecuniary harm, job loss, had already occurred. An overly narrow reading of the kind of concrete harm that must be alleged to allow a consumer to pursue a claim in federal court would wipe out consumers' ability to enforce rights which are critical to the FCRA's regulatory scheme, which depends in large part on providing consumers with truthful disclosures in order to enable them to know, and correct, what is being reported about them.

3. Employment reporting agency refusal to either maintain "strict procedures" designed to ensure that criminal background checks are "complete and up to date" or to provide contemporaneous notice to consumers that it is furnishing such a report.

Employment consumer reports are amongst the most challenging obstacles confronted by Congress' enactment of the FCRA. "Employers were placing increasing reliance on consumer reporting agencies to obtain information on the backgrounds of prospective employees. Congress found that in too many instances agencies were reporting inaccurate

information that was adversely affecting the ability of individuals to obtain employment." *Dalton*, 257 F.3d at 414.

With conventional credit reporting, when a consumer suffers the denial of a credit card or other fungible credit commodity because of inaccurate or incomplete information, the consumer has a right to make a dispute to the credit bureau, which if successful, can enable recovery of the lost opportunity. 15 U.S.C. § 1681i(a). However, this is not true for lost employment opportunities. Unlike the credit reporting industry, which is dominated by the "big three" (Experian, Trans Union, and Equifax), employment "background screeners" are often fly-by-night companies that may be difficult track down and hold accountable. When a consumer is denied a job because of an inaccurate or incomplete background check, unlike as with a credit opportunity, there is rarely a second chance to obtain that employment through later disputes.

As such, the FCRA's application to employment reports emphasizes prevention and information. Indeed, FCRA class actions are often brought to prosecute systemic violations of 15 U.S.C. § 1681k(a), which "entitles a consumer either a notification 'of the fact that public record information is being reported together with the name and address of the person to whom such information is being reported' or the maintenance of 'strict procedures designed to insure that whenever public record information which is likely to have an adverse effect on a consumer's ability to obtain employment is reported it is complete and up to date.'" *Ryals v. Strategic Screening Solutions, Inc.*,

No. 3:14CV643, 2015 WL 4606168, at *4 (E.D. Va. July 30, 2015); 15 U.S.C. § 1681k(a).

Roe v. IntelliCorp Records, Inc.

IntelliCorp is a consumer reporting agency that sold an "instant" employment background report called the "Criminal SuperSearch," over the internet. The Criminal SuperSearch purported to offer a prospective employer immediate information about a prospective employee's criminal history. Pls.' Memo. in Support of Mot. for Class Cert. and Approval of Class Counsel at 1, *Roe v. IntelliCorp Records, Inc.*, 1:12-cv-02288-JG (N.D. Ohio Feb. 18, 2013), Doc. 79-1. Unsurprisingly, given the myriad of jurisdictions that need to be searched, and the tremendous variation and complexity in the meaning of various notations in criminal records, the Criminal SuperSearch results were riddled with inaccuracies.

Moreover, IntelliCorp's practice of providing instant results, some of which included a notation that a given consumer was ineligible for hire, meant that IntelliCorp systematically failed to comply with the FCRA's requirement that the agency either follow "strict procedures" or otherwise provide contemporaneous notice to consumers so that they could preemptively address their report with the employer. 15 U.S.C. § 1681k(a). The results of IntelliCorp's wholesale failure to comply with the FCRA were devastating.

In the case of each of the plaintiffs in that action, the reporting agency had compiled a report with grossly inaccurate and incomplete information. For example, as to Michael Thomas and Mark Johnson, the reporting agency had matched criminal records to otherwise innocent consumers because their name

and date of birth were similar. Motion for Preliminary Approval of Proposed Class Settlement, at 11, *Roe v. IntelliCorp Records, Inc.*, 1:12-cv-02288-JG (N.D. Ohio Nov. 12, 2013), Doc. 124. As to Mr. Johnson, this included the allegation that he had been convicted of "sexual abuse" and "indecent assault and battery on child under 14 years of age." *Id.* As to Jane Roe, the report overstated her minor criminal history and failed to recognize that one of her convictions had been expunged. *Id.* at 10. None of the plaintiffs were offered the job for which he or she had applied.

This case is emblematic of the problems brought on by inaccurate reporting of criminal history. Despite having an outsize impact on an employer's decision, criminal background reports contain an appalling number of errors and out-of-date or out-of-time information. *See generally* National Consumer Law Center, Broken Records: How Errors by Criminal Background Checking Companies Harm Workers and Businesses (2012), *available at* http://www.nclc.org/images/pdf/pr-reports/broken-records-report.pdf. These errors persist even though the information is available in easily accessible public records and in spite of the FCRA's requirements regarding accuracy. *See* 15 U.S.C. §§ 1681e(b), 1681k(a)(2).

Not only do the criminal background check agencies frequently mix consumers' identities—resulting in the appearance that an individual with no criminal history has such a history—but they also report charges that were expunged, dismissed, or otherwise do not belong in a complete and up to date report. *See* 15 U.S.C. § 1681c(a) (forbidding reports from including certain information, such as

bankruptcies and arrests which did not result in a conviction which are older than seven years). Because people of color are significantly overrepresented in the criminal justice system, the widespread inclusion of old and/or outdated criminal record information has a disparate impact on them. Dorothy E. Roberts, *The Social and Moral Costs of Mass Incarceration in African American Communities*, 56 Stan. L. Rev. 1271, 1274 (2004).

The background screening problem also illustrates the importance of the availability of FCRA remedies on a classwide basis, even for claims that do not directly lead to job and other pecuniary losses. The *Roe* plaintiffs brought claims both about the inaccurate reporting system and the failure of reporting agencies to comply with the FCRA's notice requirements—notice that, if given, may have ameliorated the immediate damage and prevented future losses to Ms. Roe, Mr. Thomas, and Mr. Johnson.

But the lack of notice was not the proximate cause of their job loss—the inaccuracies were. And FCRA lawsuits to seek recovery for an agency's refusal to provide the long-mandated notice could never prove that the legal "cause" of the employment denial was the lack of the § 1681k(a)(1) notice. Under Spokeo's amici's view of the law, the *Roe* plaintiffs would likely be barred from bringing those claims unless they could show that, had they gotten the appropriate notice, they could have fixed the report and gotten their jobs. *See* Experian Br., at 9-10 (citing *Dreher* an example of a no-injury class action even though it was brought by a consumer whose security clearance was impacted by an inaccuracy but who ultimately sued only for notice

violations). There is no reason to put consumers to such a high burden of counterfactual proof. When violations are willful, consumers should be able to sue for statutory damages when their reports are wrong, or when they do not receive required notices.

4. Consumer reporting agency refusal to update credit reports to show that various collections, judgments, or charged off accounts were no longer owed and were discharged in bankruptcy.

White v. Experian Information Solutions, Inc.

White v. Experian Information Solutions, Inc. is a similarly unpersuasive example of a so-called 'no harm' class action. *See* Experian Br., at 9. There, too, Experian *admits* that it and the other major consumer reporting agencies systematically created inaccurate consumer reports by failing to report that certain debts had been discharged in bankruptcy. No harm, says Experian, because the failure resulted in the artificial inflation of some consumers' credit scores. Tellingly, that argument ignores the very function that bankruptcy is meant to serve: permitting certain insolvent debtors to enjoy a "new opportunity in life unhampered by the pressure and discouragement of preexisting debt." *Grogan v. Garner*, 498 U.S. 279, 286 (1991). When discharged debt continues to appear on a consumer's credit report as active debt, the purpose of bankruptcy has been defeated. Arguing that the mis-labeling of the discharged debt as still-owing did not injure those consumers because it raised their credit scores misses the point entirely—more credit is not necessarily good credit, particularly in the context of people who have already filed for bankruptcy and

who are thus demonstrably at risk of assuming more obligations than they can sustain.

Rather than its characterization as an example of an "abusive" case, *White* provides a textbook example of exactly how the "no proven actual damages" remedy works. Terri White and each similarly situated consumer had filed a Chapter 7 bankruptcy. As a result, their short term credit prospects were ended. However, their longer-term credit prospects had improved, as each consumer was now debt-free and could begin the arduous process of rebuilding their financial viability. And yet, Experian and its co-defendants had refused to permit the commencement of this rebuilding—still saddling the credit reports with accounts and financial obligations that were now ended.

The problem faced by these consumers in *White* was that there was no means to "prove" and show causation for actual damages. Statutory damages were thus an appropriate proxy for actual damages.

5. Credit reporting agency refusal to report account credit limits where it impacts consumer credit scores.

Harris v. Experian Information Solutions, Inc.

Experian and the Chamber of Commerce also contend that *Harris v. Experian Information Solutions, Inc.* is abusive. The case was based on Experian's alleged knowing and willful failure to report the credit limits on certain credit cards. According to amici, not all consumers were "harmed" because the omission of the credit limit information increased the credit scores of some consumers while decreasing others. Experian Br., at 8; Br. of the Chamber of Commerce of the United States of

America, et al, as Amici Curiae, at 17. They make this contention even though Experian, one of the nation's largest credit reporting agencies, and a corporation that has made billions of dollars by selling credit reports, *admits* that, as a matter of course, it *knowingly* failed to include information that had a material impact on consumers' credit scores. Yet, Experian argues that, because the inaccurate representation increased some consumers' scores, it should escape liability. Aside from the fact that Experian believes it should be immune from its widespread violation of a federal statute based on an unintended consequence, this position is problematic because an artificially inflated credit score cannot be conflated with the absence of a concrete injury. Many consumers assume that if their credit score is such that they qualify for a given kind of credit, that kind of credit is appropriate for them and within their means, but the experience of our recent financial crisis demonstrate that that assumption is not correct. *See* Gary Klein & Shennan Kavanaugh, *Causes of the Subprime Foreclosure Crisis and the Availability of Class Action Responses*, 2 Ne. U. L.J. 111, 113-16 (2010). Setting up a system that routinely functions to offer consumers credit opportunities that are not appropriate for them is not in consumers' best interest, and the Court should not endorse any view of standing which allows for inaccurate reporting so long as the inaccuracy is to the consumer's purported "benefit." In the context of consumer reporting, there is no such thing as an inaccuracy which operates to a consumer's benefit because such inaccuracies inevitably put consumers in the position of being offered opportunities which are not sustainable, or which are unreliable because the consumer remains

in constant danger that the opportunity will evaporate if the inaccuracy is revealed.

6. Consumer reporting agency refusal to provide consumers with a legally mandated copy of their consumer file.

Meyer v. National Tenant Network, Inc.

National Tenant Network, Inc. (NTN) is a consumer reporting agency that provides credit and criminal reports. Third Am. Compl., at 2, *Meyer v. National Tenant Network, Inc.*, No. 3:13-cv-03187-JSC (N.D. Cal. Mar. 21, 2014), Doc. 50. Harold Meyer and his wife Phyllis Meyer encountered NTN when they sought to become the live-on assistant managers of an RV park. *Meyer v. National Tenant Network, Inc.*, 10 F. Supp. 3d 1096, 1098 (N.D. Cal. 2014). They were hired into the positions, pending a background check. *Id.* The property management company, however, rescinded the offer after receiving Mr. Meyer's NTN consumer report. *Id.*

Specifically, Mr. Meyer's report falsely stated that he was a "violent sex offender" who failed to register as such, and had committed "sexual battery" and "aggravated sexual battery." *Id.* After the management company rescinded his offer of employment, Mr. Meyer sought to obtain a copy of his report from the prospective employer, but the prospective employer refused, in part because the employer was forbidden from providing him with a copy by its contract with NTN, which contained an illegal provision forbidding the employer from providing him with a copy of the report. *Id.* at 1098-99. *See* 15 U.S.C. § 1681e(c) (prohibiting a reporting agency from prohibiting a user of a consumer report "from disclosing the contents of the report to the

consumer, if adverse action against the consumer has been taken"). He also sought a copy of his consumer file directly from NTN pursuant to § 1681g(a) (requiring a reporting agency to disclose the information in the file on the consumer upon request). *Meyer*, 10 F. Supp. 3d at 1098. He requested his report on multiple occasions, but NTN refused to respond to his requests. *Id.* And when Mr. Meyer hired a lawyer, who also requested the report from NTN, NTN still refused to give Mr. Meyer a copy of his report. *Id.* Mr. Meyer was able to obtain a copy of his only when his lawyer requested it from the prospective employer. *Id.* at 1099.

Though it was the inaccurate report and not the informational violations that proximately caused Mr. Meyer to lose his job offer, the right to review his consumer file, and to receive a copy of the actual information NTN had disseminated about him was critical to Mr. Meyer's ability to correct the inaccurate information. Until he finally gained access to his reports, which happened only after he hired lawyers, Mr. Meyer had no way to know what false information had been reported about him, or to seek an appropriate remedy. But, again, under the view urged by Spokeo, Mr. Meyer would not be able to bring suit on the basis of the notice violations alone. Without the ability to enforce their rights to obtain copies of their consumer files, consumers like Mr. Meyer will be hobbled in their ability to enforce the FCRA's accuracy requirements, and put in an unenviable, and unjustifiable, chicken-egg situation, where consumers are unable to demonstrate the consequences of erroneous reports because their right to obtain the reports is rendered toothless.

Not all inaccurate reports and notice violations are as obviously harmful as those falsely labeling an individual a sex offender or a terrorist, or those that result in a futile, Kaftkaesque attempt to fix a life-changing error, as in *Dennis* and *Dreher*. But even those errors that the consumer reporting agencies call "positive" can have negative impacts. For example, a "positive" inaccuracy might result in a consumer qualifying for a mortgage that she cannot afford to pay or a credit increase that would ruin his finances. In Thomas Robins's case, the "positive" overstatement of his education means that a potential employer might pass him over as being too expensive to hire, or deny him employment because it viewed him as overqualified and unlikely to remain in the position.

* * *

Spokeo and its amici cite *no* other examples of supposedly abusive class actions against consumer reporting agencies. The predominance of class actions resulting from real-world harm overwhelms even the so-called abusive actions they point to—actions that are not at all abusive once one digs under the surface. In short, there is no evidence that the "abusive" "no-harm" class actions the credit reporting agencies tout actually exist.

CONCLUSION

Contrary to the assertions of Spokeo and its amici, FCRA class actions against credit reporting agencies for systemic inaccuracies and notice violations involve the real-world harms the FCRA was meant to prevent. And given the difficult-to-quantify nature of those harms along with the availability of small statutory damages, it is class

actions that, as a practical matter, have the biggest role in effectively enforcing the FCRA and carrying out Congress' goal of a fair and accurate consumer reporting system.

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REPLY BRIEF

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Supreme Court of the United States

SPOKEO, INC.,

Petitioner,

v.

THOMAS ROBINS,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF PUBLIC KNOWLEDGE AS *AMICUS CURIAE* IN SUPPORT OF AFFIRMANCE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT: Petitioner's Narrow View of Article III Standing Could Exacerbate Abuse of the Patent System . . 4

I. The Issuance of Low-Quality Patents on Improper, Unpatentable Subject Matter Continues to Cause Serious Public Harm 4

II. Congress's Consistent Means for Facilitating Invalidation of Harmful Patents Has Been to Grant Private Parties Statutory Rights to Challenge Patents 7

III. Spokeo's Proposed "Real-World Harm" Test Could Inhibit Congress's Efforts to Use Private Actions Against Problematic Patents 10

CONCLUSION 17

TABLE OF AUTHORITIES

CASES

Alice Corp. Pty. Ltd. v. CLS Bank International,
134 S. Ct. 2347 (2014) 1, 5

Already, LLC v. Nike, Inc.,
133 S. Ct. 721 (2013) 12, 16

Arrowhead Industrial Water, Inc.
v. Ecolochem, Inc.,
846 F.2d 731 (Fed. Cir. 1988) 12

Association for Molecular Pathology v. USPTO,
689 F.3d 1303 (Fed. Cir. 2012), *rev'd on other grounds sub nom. Ass'n for Molecular Pathology v. Myriad Genetics, Inc.*, 133 S. Ct. 2107 (2013) 12, 14

Atlantic Works v. Brady,
107 U.S. 192 (1883) 5

Bilski v. Kappos,
130 S. Ct. 3218 (2010) 6

Blonder-Tongue Laboratories, Inc.
v. University of Illinois Foundation,
402 U.S. 313 (1971) . . . 6, 13

Cardinal Chemical Co.
v. Morton International, Inc.,
508 U.S. 83 (1993) 6

Commil USA, LLC v. Cisco Systems, Inc.,
135 S. Ct. 1920 (2015) 1, 5

Consumer Watchdog
v. Wisconsin Alumni Research Foundation,
753 F.3d 1258 (Fed. Cir. 2014) 12, 14

eBay Inc. v. MercExchange, LLC,
547 U.S. 388 (2006) 5

Gottschalk v. Benson,
409 U.S. 63 (1972) 5

Graham v. John Deere Co.,
383 U.S. 1 (1966) 5

In re Bilski,
545 F.3d 943 (Fed. Cir. 2008) (en banc) 6

Kimble v. Marvel Entertainment, LLC,
135 S. Ct. 2401 (2015) 1

KSR International Co. v. Teleflex Inc.,
550 U.S. 398 (2007) 5

Lear, Inc. v. Adkins,
395 U.S. 653 (1969) 14

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992) 4, 11

Maryland Casualty Co. v. Pacific Coal & Oil Co.,
312 U.S. 270 (1941) 16

Mayo Collaborative Services
v. Prometheus Laboratories, Inc.,
132 S. Ct. 1289 (2012) 5

MedImmune, Inc. v. Genentech, Inc.,
549 U.S. 118 (2007) 6, 12

Nautilus, Inc. v. Biosig Instruments, Inc.,
134 S. Ct. 2120 (2014) 1

Patlex Corp. v. Mossinghoff,
758 F.2d 594 (Fed. Cir. 1985) 7–8

Prasco, LLC v. Medicis Pharmaceutical Corp.,
537 F.3d 1329 (Fed. Cir. 2008) 15

Red Wing Shoe Co.
v. Hockerson-Halberstadt, Inc.,
148 F.3d 1355 (Fed. Cir. 1998) 15

Robins v. Spokeo, Inc.,
742 F.3d 409 (9th Cir. 2014) . 4

Summit Data Systems, LLC v. EMC Corp.,
No. 1:10-cv-749, 2014 WL 4955689 (D. Del. Sept. 25, 2014) (mem.), *available at* http://cdn.arstechnica.net/wp-content/uploads/2014/10/NetApp-Dk-No-260_memo.pdf 16

Super Sack Manufacturing Corp.
v. Chase Packaging Corp.,
57 F.3d 1054 (Fed. Cir. 1995) 15–16

Warth v. Seldin,
422 U.S. 490 (1975) 12

CONSTITUTIONAL PROVISIONS

U.S. Const. art. I, § 8, cl. 8 7

U.S. Const. art. III 2–4, 6–7, 10, 15

STATUTES

35 U.S.C. § 101 (2013) 6
——— § 103 5
——— § 271(d) 10
——— § 281 10
——— § 302 7
——— §§ 311, 319 9
——— § 318(a) 10
——— § 319 10–11
——— §§ 321, 329 9
35 U.S.C. § 311(a) (2010) (repealed 2011) 9
——— § 315(b)(2) 8, 11
America Invents Act, Pub. L. No. 112-29, 125 Stat. 284 (2011) 9
American Inventors Protection Act of 1999, Pub. L. No. 106-113, 113 Stat. 1501 8
Patent and Trademark Office Authorization Act of 2002, Pub. L. No. 107-273, 116 Stat. 1758 8

OTHER SOURCES

126 Cong. Rec. 29895 (1980) (statement of Mr. Kastenmeier) 7
145 Cong. Rec. 29960 (1999) (statement of Mr. Lott) 8

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America Invents Act, H.R. Rep. No. 112-98, pt. 1 (2011), *available at* http://www.uspto.gov/sites/default/files/aia_implementation/crpt-112hrpt98-pt1.pdf 11

Appeals in Patent Reexamination Proceedings, H.R. Rep. No. 107-121 (2001), *available at* https://www.congress.gov/107/crpt/hrpt121/CRPT-107hrpt121.pdf 11

Michael J. Burstein, *Rethinking Standing in Patent Challenges*, 83 Geo. Wash. L. Rev. 498 (2015) 12, 14–15

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Remarks on Signing the Leahy-Smith America Invents Act in Alexandria, Virginia, Daily Comp. Pres. Doc. No. 644 (Sept. 16, 2011), *available at* http://www.gpo.gov/fdsys/pkg/DCPD-201100644/pdf/DCPD-201100644.pdf . . 9

Transcript of Oral Argument, *Already, LLC v. Nike, Inc.*, 133 S. Ct. 721 (Nov. 7, 2012) (No. 11-892) 12

Katharine M. Zandy, *Too Much, Too Little, or Just Right? A Goldilocks Approach to Patent Reexamination Reform*, 61 N.Y.U. Ann. Surv. Am. L. 865 (2006), *available at* http://www.law.nyu.edu/sites/default/files/ecm_pro_064639.pdf 14

INTEREST OF *AMICUS CURIAE*

Public Knowledge[1] is a non-profit organization that is dedicated to preserving the openness of the Internet and the public's access to knowledge, promoting creativity through balanced intellectual property rights, and upholding and protecting the rights of consumers to use innovative technology lawfully. Public Knowledge advocates on behalf of the public interest for a balanced patent system, particularly with respect to new and emerging technologies.

Public Knowledge has previously served as *amicus* in key patent cases. *E.g.*, *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401 (2015); *Commil USA, LLC v. Cisco Sys., Inc.*, 135 S. Ct. 1920 (2015); *Alice Corp. Pty. Ltd. v. CLS Bank Int'l*, 134 S. Ct. 2347 (2014); *Nautilus, Inc. v. Biosig Instruments, Inc.*, 134 S. Ct. 2120 (2014).

[1] Pursuant to Supreme Court Rule 37.3(a), all parties received appropriate notice of and consented to the filing of this brief. Pursuant to Rule 37.6, no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of the brief. No person or entity, other than *amicus*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Petitioner Spokeo's effort to confine Article III standing to so-called "real-world harm" would not be limited to situations of information privacy; it could have far-ranging effects on diverse areas of the law. Of particular concern to *amicus*, this "real-world harm" test could negatively interfere with resolving abuses of the patent system, adding to the reasons why this Court should avoid adopting such a test.

This Court has recognized the public problems created by companies who "use patents as a sword to go after defendants for money, even when their claims are frivolous." Such abusive litigation often originates from overbroad patents of questionable validity that are asserted to cover all manner of basic, everyday technologies. Indeed, this Court has repeatedly sought to facilitate the invalidation of such improperly issued patents. Recent decisions have tightened the statutory requirements for patentability, such as subject matter eligibility and obviousness, and rejected erroneous limitations on Article III standing created by the Federal Circuit.

Elimination of invalid-yet-issued patents depends on parties willing to pursue invalidation actions, and the parties who are most willing to do so come from perhaps unexpected corners. Interest-based organizations, such as public interest groups like *amicus*, are arguably in the best position to prosecute an invalidity case, because such organizations have non-pecuniary interests that overcome the collective action problem discouraging many parties from putting up the high costs of patent invalidation. New market entrants and market competitors may also seek to invalidate problematic patents in order to quiet title on their business operations. These

private parties are necessary to the public goal of clearing out the patent system of improper patents.

Congress has already sought to leverage the motivations of these interest-based groups, new entrants, competitors, and others by creating administrative proceedings for challenging patent validity. Between 1980 and today, Congress has enacted laws that have given, to all private parties, more and more power to seek invalidation of patents before the U.S. Patent and Trademark Office, and to appeal decisions of that Office to the Court of Appeals for the Federal Circuit.

But an overly cramped view of Article III standing, such as Spokeo's "real-world harm" standard, could discourage these parties and others from utilizing these proceedings to pursue the public good of patent invalidation. The Federal Circuit's similarly cramped declaratory judgment standing doctrine, which looks much like Spokeo's test, already stands in the way of many of the aforementioned parties from obtaining declaratory judgments of invalidity. Applying Spokeo's "real-world harm" test to appeals of administrative challenge proceedings, then, could make those proceedings lopsidedly unfair, with patent owners always being able to appeal adverse decisions but certain patent challengers being denied the symmetric privilege. This would dicsourage interest-based groups and others from bringing important challenges to questionable patents, thus enhancing "the *in terrorem* power of patent trolls" who assert such patents.

Congress correctly and effectively uses private party action to tackle public policy problems such as abuse of the patent system. Neither Article III of the Constitution nor Spokeo's misguided "real-world harm" test stands in the way of Congress doing so.

ARGUMENT

PETITIONER'S NARROW VIEW OF ARTICLE III STANDING COULD EXACERBATE ABUSE OF THE PATENT SYSTEM

The Court of Appeals for the Ninth Circuit held that "violations of statutory rights" created by Congress are "concrete, *de facto* injuries" that may confer Article III standing. *Robins v. Spokeo, Inc.*, 742 F.3d 409, 413 (9th Cir. 2014) (Pet. Cert. 8a) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 578 (1992)). Petitioner Spokeo counters that standing requires "concrete harm," which it vaguely defines as "real-world injury." Br. Pet'r 2.

Though the facts of the present case relate to issues of information privacy, the standing issue broadly affects all areas of law. Of particular concern to *amicus*, Spokeo's proposed standing test could frustrate efforts to invalidate problematic patents. This Court's patent jurisprudence has repeatedly sought to avoid the inhibitory power of questionable patents, and so the Court should look skeptically at Spokeo's "real-world harm" test, which could have the undesirably opposite effect of enhancing the enforceability of such patents and consequently their potential for abuse.

I. THE ISSUANCE OF LOW-QUALITY PATENTS ON IMPROPER, UNPATENTABLE SUBJECT MATTER CONTINUES TO CAUSE SERIOUS PUBLIC HARM

It was only last Term when every Justice of this Court agreed that abusive assertion of questionable patents was a major public policy problem demanding solution. Writing for the Court, Justice Kennedy observed that "companies may use patents as a sword to go after defendants for money, even when their claims are frivolous,"

which could result in "a harmful tax on innovation." *Commil USA, LLC v. Cisco Sys., Inc.*, 135 S. Ct. 1920, 1930 (2015). Justice Scalia used stronger language, warning against "the *in terrorem* power of patent trolls" to threaten third parties. *Id.* at 1932 (Scalia, J., dissenting).

Fear of assertion of likely-invalid patents to threaten industry was not unique to *Commil*. In *eBay Inc. v. MercExchange, LLC*, Justice Kennedy wrote: "An industry has developed in which firms use patents not as a basis for producing and selling goods but, instead, primarily for obtaining licensing fees." 547 U.S. 388, 396 (2006) (Kennedy, J., concurring). And as far back as 1883, this Court decried patent procedures that improperly "grant a monopoly for every trifling device, every shadow of a shade of an idea, which would naturally and spontaneously occur to any skilled mechanic or operator." *Atl. Works v. Brady*, 107 U.S. 192, 200 (1883).

This Court's frustration about the existence of such questionable patents has driven its many decisions, recent and historical, that have tightened the requirements for patentability. The doctrine of obviousness is a key defense against undesirable patents, for which this Court has taken an "expansive and flexible approach," *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 415 (2007), in order to avoid "patents whose effects are to remove existent knowledge from the public domain," *Graham v. John Deere Co.*, 383 U.S. 1, 6 (1966); *see* 35 U.S.C. § 103 (2013). This Court's subject matter eligibility decisions also shield the public from excessive patents on "the basic tools of scientific and technological work." *Gottschalk v. Benson*, 409 U.S. 63, 67 (1972); *accord Alice Corp. Pty. Ltd. v. CLS Bank Int'l*, 134 S. Ct. 2347, 2355 (2014); *Mayo Collaborative Servs. v. Prometheus Labs., Inc.*, 132 S. Ct.

1289, 1301 (2012); *see* 35 U.S.C. § 101. Indeed, prior to the Supreme Court's explication on § 101 eligibility, patents issued under the more lenient Federal Circuit standard "ranged from the somewhat ridiculous to the truly absurd." *Bilski v. Kappos*, 130 S. Ct. 3218, 3259 (2010) (Breyer, J., concurring) (quoting *In re Bilski*, 545 F.3d 943, 1004 (Fed. Cir. 2008) (en banc) (Mayer, J., dissenting)). These decisions reflect the general public interest against questionable, unproductive patents.

Rejection of false limits on Article III standing has also played a part in this Court's jurisprudence on avoiding the ill effects of invalid patents. *MedImmune, Inc. v. Genentech, Inc.* struck down the Federal Circuit's rule that a patent licensee has no standing to contest the validity of the licensed patent. *See* 549 U.S. 118, 137 (2007); *see also* Megan M. La Belle, *Standing to Sue in the* Myriad Genetics *Case*, 2 Cal. L. Rev. Circuit 68, 85 (2011), URL *supra* p. vi (explaining that effect of *MedImmune* is to facilitate invalidation of "bad patents"). And in *Cardinal Chemical Co. v. Morton International, Inc.*, this Court rejected a Federal Circuit rule of automatically mooting declaratory judgments of invalidity when noninfringement had been found, in part because of "the importance to the public at large of resolving questions of patent validity." 508 U.S. 83, 100 (1993) (citing *Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313 (1971)).

In sum, improperly issued patents cause incredible harm to the economy, to innovation, and to the public. But avoidance of those negative effects depends on avenues for contesting those patents that are plainly invalid yet duly issued, and the effectiveness of those avenues, as will be argued below, depends on the proper interpretation of Article III in the present case.

II. Congress's Consistent Means for Facilitating Invalidation of Harmful Patents Has Been to Grant Private Parties Statutory Rights to Challenge Patents

Insofar as the patent system has gone astray of its constitutional purpose to "promote the progress of science and the useful arts," U.S. Const. art. I, § 8, cl. 8, Congress has sought to grant private parties the right to challenge those patents that should not have ever issued, and—importantly—to open the federal courts to appeals of such third-party challenges. Congress has done so with the expectation that it has authority to do so under Article III, and rejection of Spokeo's "real-world harm" test would continue to allow Congress to address this important public issue of patent validity.

As the Patent Act was originally conceived, the only way to have an invalid patent declared as such was through the courts. The lack of mechanisms for reconsideration of issued patents was seen as a major public interest problem, as the difficulty of challenging questionable patents had diminished "investor confidence in the certainty of patent rights." *Patlex Corp. v. Mossinghoff*, 758 F.2d 594, 602 (Fed. Cir. 1985) (quoting 126 Cong. Rec. 29895 (1980) (statement of Mr. Kastenmeier)).

To address this deficiency, in 1980 Congress created a process known as ex parte reexamination. "Any person at any time may file a request for reexamination" of an issued patent—that is, the class of private parties who may use the procedure is unlimited. 35 U.S.C. § 302. But while ex parte reexamination is used by private parties, "Congress had an important public purpose in mind" when it created the procedure: "to cure defects in an administrative system" imperfect in issuing correct

and valid patents. *Patlex*, 758 F.2d at 601, 603; *see also Amending the Patent and Trademark Laws*, H.R. Rep. No. 96-1307, at 3–4 (1980), *available at* URL *supra* p. vi ("Reexamination will permit efficient resolution of questions about the validity of issued patents" which will "promote industrial innovation by assuring the kind of certainty about patent validity.").

The subsequent enactment of inter partes reexamination in 1999 indicates Congress's determination that the public interest demanded even greater participation by private parties. Unlike ex parte reexamination, in which a private party may initiate a challenge to a patent but not participate in the proceeding, inter partes reexamination permits the challenger to participate by responding to the patent owner's arguments. 35 U.S.C. § 315(b)(2) (2010) (repealed 2011). Because a requester of ex parte reexamination "cannot participate at all after initiating the proceedings," Congress found that "such reexamination has been used infrequently," and so Congress sought to give parties "an opportunity to argue their case for patent invalidity in the USPTO" in an effort to encourage use of the procedure. 145 Cong. Rec. 29972 (1999) (statement of Mr. Lott).

Further cementing the key role of private parties in patent reexamination: the original inter partes reexamination statute disallowed the challenger from appealing to the federal courts. American Inventors Protection Act of 1999, Pub. L. No. 106-113, sec. 4604, § 315(b), 113 Stat. 1501, 1501A–569. But in 2002, Congress amended that statute specifically to permit challengers to appeal decisions of patentability up to the Court of Appeals for the Federal Circuit. *See* Patent and Trademark Office Authorization Act of 2002, Pub. L. No. 107-273,

sec. 13106(a), 116 Stat. 1758, 1900–01. Congress specifically intended to allow the patent challenger in an inter partes reexamination—who, again, may be "any third-party requester," 35 U.S.C. § 311(a) (2010) (repealed 2011)—to have the federal court system available for reexamining questionable patents. *See infra* p. 11 (discussing legislative history).

Continuing this project of expanding private party ability to challenge patents, the America Invents Act of 2011 replaced inter partes reexamination with two new procedures, inter partes review and post-grant review. These procedures had the public interest purpose to "improve patent quality and help give entrepreneurs the protection and the confidence they need to attract investment, to grow their businesses, and to hire more workers." Remarks on Signing the Leahy-Smith America Invents Act in Alexandria, Virginia, Daily Comp. Pres. Doc. No. 644 (Sept. 16, 2011), *available at* URL *supra* p. vii. To achieve that purpose, these procedures again allow any third party to initiate a patent reconsideration procedure, and specifically allow those third parties to appeal adverse decisions to the Court of Appeals for the Federal Circuit. *See* 35 U.S.C. §§ 311, 319 (inter partes review); §§ 321, 329 (post grant review). Congress thus renewed its expectation that all parties wishing to challenge patents should have a right of appeal.

Congress has sought to avoid the public harms caused by improperly issued patents through a consistent technique: creating private rights to administrative procedures, appealable to the federal courts, to challenge those improper and harmful patents. Spokeo's proposed "real-world harm" standard subverts this technique and thus is is inferior policy.

III. SPOKEO'S PROPOSED "REAL-WORLD HARM" TEST COULD INHIBIT CONGRESS'S EFFORTS TO USE PRIVATE ACTIONS AGAINST PROBLEMATIC PATENTS

Congress has made substantial headway into developing effective procedures for challenging patents, but Spokeo's unduly narrow "real-world harm" test could potentially render those efforts ineffectual. That test could make these procedures unfairly imbalanced, affording only patent owners a right of appeal while denying patent challengers the same right. Besides contradicting congressional intent, such a discrepant result would discourage important parties from using these patent challenge procedures, undermining the public good of clearing the patent system of invalid patents.

1. Spokeo's "real-world harm" test, applied to administrative patent challenge proceedings such as inter partes review, would potentially lead those proceedings to be unfairly lopsided in many situations. In such proceedings, an agency decides the validity of an issued patent. *See, e.g.*, 35 U.S.C. § 318(a). It is unquestioned that the patent owner has standing to appeal an adverse decision that the patent is invalid. *See, e.g.*, § 319.[2] But Spokeo's theory of Article III standing could cut off certain patent challengers from a corresponding right of ap-

[2]Incidentally, the patent system itself relies on Congress's ability to confer standing on parties "based on a bare violation of a federal statute" in a manner contrary to Spokeo's arguments. Br. Pet'r i. A patent owner may seek redress for patent infringement even while suffering absolutely no actual harm, for example where the patent owner has no intention to commercialize the patented invention. *See* 35 U.S.C. § 281 ("A patentee shall have remedy by civil action for infringement of his patent."); § 271(d) (patentee shall not be denied relief for having "refused to license or use any rights to the patent").

peal, since those challengers would not suffer "real-world harm." Giving patent owners two bites at the apple while cutting off challengers at one would tilt the challenge procedure in favor of patent owners, and particularly in favor of owners of highly questionable patents who would be consequently less vulnerable to challenge.

It was indeed Congress's intent *not* to construct such a lopsided system. Congress experimented with allowing only patent owners to appeal, when it created inter partes reexamination in 1999. *See* discussion *supra* p. 8. This one-sided appeal scheme was quickly deemed a failure:

> [T]he asymmetry controlling which parties may appeal the agency's *inter partes* reexamination decisions to the Federal courts is considered one of the major defects of the patent system and results in a major disincentive to invoke reexamination as a way of curing allegedly defective patents.

Appeals in Patent Reexamination Proceedings, H.R. Rep. No. 107-121, at 2 (2001), *available at* URL *supra* p. vi. Congress immediately corrected this error by giving both sides rights to appeal. *See* 35 U.S.C. § 315(b)(2) (2010) (repealed 2011); *see also America Invents Act*, H.R. Rep. No. 112-98, pt. 1, at 45 (2011), *available at* URL *supra* p. vi; 35 U.S.C. § 319. Congress intended to create effective mechanisms for challenging defective patents, and effectiveness demands equality of access to the federal courts.[3]

[3]Of course, standing to appeal a post-grant patentability determination must be based on an injury to a "concrete and particularized" interest. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *see also* Br. Resp't 24–26. In a patent challenge pro-

2. Interest-based organizations, new market entrants, and others would potentially suffer this unbalanced appeal situation with patent challenges, were Spokeo's "real-world harm" test made the law.

Though Spokeo fails to define clearly the contours of its test, it is likely that the Federal Circuit would construe "real-world harm" to align with its arguably questionable[4] standard for patent declaratory judgment standing, which requires the party seeking patent invalidation to show "both (1) an affirmative act by the patentee related to the enforcement of his patent rights . and (2) meaningful preparation to conduct potentially infringing activity." *Ass'n for Molecular Pathology v. USPTO*, 689 F.3d

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ceeding, that requirement is satisfied by the individual challenger's congressionally-conferred right to bring and appeal the proceeding is a "statutory right or entitlement," which is particularized to the challenger. *Warth v. Seldin*, 422 U.S. 490, 514 (1975); *see also* Br. Resp't 24–26. Furthermore, an adverse decision may independently give a patent challenger standing to appeal. *Cf.* Transcript of Oral Argument at 29–31, *Already, LLC v. Nike, Inc.*, 133 S. Ct. 721 (Nov. 7, 2012) (No. 11-892) (Solicitor General suggesting that "there could be some circumstances in which [an agency]'s decision would create injury in fact"). Or the preclusive effects of the decision may give rise to a redressable injury. *Cf. Consumer Watchdog v. Wis. Alumni Research Found.*, 753 F.3d 1258, 1263 (Fed. Cir. 2014).

[4]In *MedImmune*, this Court rejected the Federal Circuit's so-called "reasonable apprehension of suit" test for declaratory judgment standing. *See* 549 U.S. at 132 n.11. That defunct test strongly resembles the Federal Circuit's current test, making that current test difficult to justify under *MedImmune*. *Cf. Arrowhead Indus. Water, Inc. v. Ecolochem, Inc.*, 846 F.2d 731, 736 (Fed. Cir. 1988) (describing the older test as requiring the declaratory plaintiff to have (1) "a reasonable apprehension that the defendant will initiate suit" and (2) "either produced the device or [] prepared to produce that device"); Michael J. Burstein, *Rethinking Standing in Patent Challenges*, 83 Geo. Wash. L. Rev. 498, 508 (2015) ("This test is quite similar to that which the Supreme Court disapproved in *MedImmune*.").

1303, 1318 (Fed. Cir. 2012), *rev'd on other grounds sub nom. Ass'n for Molecular Pathology v. Myriad Genetics, Inc.*, 133 S. Ct. 2107 (2013). As explained in detail below, these parties have all been denied standing under this declaratory judgment standard, suggesting that they may also lack standing for appealing administrative patent challenges under Spokeo's conception.

By making it more difficult for these important parties to invalidate harmful patents, the unwelcome result of Spokeo's proposed test would potentially be to enhance the enforceability of those improperly-granted patents, allowing them to continue to be asserted to the detriment of industry and innovators. This Court should not stand for such a result, and accordingly should reject the proposed test.

a. Public interest groups, trade associations, and other interest-based entities may suffer imbalance in procedure due to a lack of standing. This is a particularly unfortunate consequence because such groups are often in the best position to bring effective and important challenges to patents.

Patent invalidation is a public good: invalidation benefits the entire public, beyond just the parties to the action. *See Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 350 (1971). Thus, even direct competitors may forego invalidity actions, preferring to "sit back and hope that someone else will do the hard work of putting the invention into the public domain." Megan M. La Belle, *Patent Law as Public Law*, 20 Geo. Mason L. Rev. 41, 66 (2012) [hereinafter La Belle, *Public Law*] (internal quotations omitted); *see also* Joseph Farrell & Robert P. Merges, *Incentives to Challenge and Defend Patents*, 19 Berkeley Tech. L.J. 943, 952 (2004).

As a result, interest-based organizations, "whose incentives to bring suit are not limited to pecuniary interests," are in a strong position to overcome this collective action problem and bring patent challenges. Michael J. Burstein, *Rethinking Standing in Patent Challenges*, 83 Geo. Wash. L. Rev. 498, 546 (2015). Indeed, several such groups have done so to great success, obtaining invalidity decisions on patents directed to basic, widely-used computer technology.[5]

But interest-based organizations will likely lack the "real-world harm" that Spokeo's test demands for standing. Under current Federal Circuit jurisprudence, such groups already generally lack standing to bring declaratory judgment actions of invalidity because they have not made "meaningful preparation to conduct potentially infringing activity." *See Ass'n for Molecular Pathology*, 689 F.3d at 1323; *Consumer Watchdog v. Wis. Alumni Research Found.*, 753 F.3d 1258, 1263 (Fed. Cir. 2014); La Belle, *Public Law*, *supra*, at 79.

Assuming that "real-world harm" mirrors the declaratory judgment standard, such interest-based entities may find themselves stuck with and thus discouraged from an unbalanced patent challenge procedure. Turning such entities away from bringing patent challenges would be a serious blow to the "important public interest in permitting full and free competition in the use of ideas which are in reality a part of the public domain." *Lear, Inc. v. Adkins*, 395 U.S. 653, 670 (1969). This undesirable result disfavors Spokeo's proposed standing test.

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[5] *See* Katharine M. Zandy, *Too Much, Too Little, or Just Right? A Goldilocks Approach to Patent Reexamination Reform*, 61 N.Y.U. Ann. Surv. Am. L. 865, 897 (2006), *available at* URL *supra* p. vii; Joe Mullin, *Infamous "Podcasting Patent" Knocked Out*, Ars Technica (Apr. 10, 2015), URL *supra* p. vii.

b. Potential new market entrants may also be discouraged from developing new products or services due to a procedural imbalance resulting from Spokeo's narrow "real-world harm" test.

A company may wish to seek invalidation of a patent in an effort to "quiet title" prior to entering a new market that may be covered by that patent. But again in the context of declaratory judgments, the Federal Circuit has held that a new market entrant may lack a cognizable injury because that new entrant, even when facing a known threat of future patent litigation, does not suffer a "restraint on the free exploitation of non-infringing goods." *Prasco, LLC v. Medicis Pharm. Corp.*, 537 F.3d 1329, 1339 (Fed. Cir. 2008) (quoting *Red Wing Shoe Co. v. Hockerson-Halberstadt, Inc.*, 148 F.3d 1355, 1360 (Fed. Cir. 1998)); *see also* Burstein, *supra*, at 534–37.

If Congress is unable to open the appeals courts to such companies conducting administrative patent challenge procedures, then those companies will similarly be dissuaded from using those procedures.

c. Furthermore, *any* party who seeks to use a patent challenge procedure may face the imbalanced appeal situation, in view of a patent owner's unilateral ability to evaporate traditional Article III injury.

In *Super Sack Manufacturing Corp. v. Chase Packaging Corp.*, the Federal Circuit held that when a patent owner grants a unilateral covenant not to sue to a party seeking a declaratory judgment of invalidity, the party automatically and immediately loses standing to prosecute the declaratory judgment action. *See* 57 F.3d 1054, 1059 (Fed. Cir. 1995). Applying this Court's Article III doctrine, the Court of Appeals found that the party seeking the invalidity declaration could not "establish an ac-

tual controversy on the totality of the circumstances." *Id.* at 1058 (citing *Md. Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 272 (1941)) (internal quotes omitted). The covenant, said the Court of Appeals, rendered the patent owner "forever estopped . . . from asserting liability" over the patents and products in suit, which thus "removes from the field any controversy sufficiently actual to confer jurisdiction over this case." *Id.* at 1059.[6]

If *Super Sack* were applied under Spokeo's "real-world harm" test, then any party who administratively challenges a patent may find itself, midway through the proceeding after potentially massive expenditures in building up an invalidity case, in a situation procedurally tilted toward the patent owner. This possibility could strongly discourage all parties from choosing to seek patent invalidation in the first place, again frustrating the effectiveness of those invalidation proceedings and encouraging abusive assertion of invalid patents.[7]

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[6] In *Already, LLC v. Nike, Inc.*, this Court recently addressed the question of mootness in view of a covenant not to sue. *See* 133 S. Ct. 721 (2013). The present argument assumes that *Super Sack* is correct and applicable law and thus does not need to consider the effect of *Already* on *Super Sack*. But it is worth observing that *Already* does not uniformly support *Super Sack*. *See Already*, 133 S. Ct. at 731 (relying on trademark-specific doctrine inapplicable to patent law); *id.* at 733 (Kennedy, J., concurring) (warning against literal application of *Already* to other covenants not to sue).

[7] The *Super Sack* doctrine has already led to to a troublingly frequent abusive practice in which patent holders initiate infringement lawsuits, demand nuisance settlements, and drop the suits right before a court invalidates the patents at issue. *See, e.g., Summit Data Sys., LLC v. EMC Corp.*, No. 1:10-cv-749, 2014 WL 4955689, at *5 (D. Del. Sept. 25, 2014) (mem.), *available at* URL *supra* p. iv; Rick Mescher, *Update on Patent Trolls*, Tech. L. Source (May 15, 2013), URL *supra* p. vi.

It is plainly obvious that Congress intended neither to create such a procedurally imbalanced system nor to impose that imbalance on all of these important entities, given the statutory text and legislative history. By rejecting Spokeo's "real-world harm" test, this Court would permit Congress to ensure balance in such proceedings for reconsideration of patents, thereby serving an important public purpose of improving the patent system.

CONCLUSION

For the foregoing reasons, this Court should affirm the Court of Appeals for the Ninth Circuit.

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REPLY BRIEF

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SPOKEO, INC.,

Petitioner,

v.

THOMAS ROBINS,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR PUBLIC LAW PROFESSORS AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether Congress may confer Article III standing upon a plaintiff who suffers no concrete harm other than the violation of a private right conferred by a federal statute.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

INTEREST OF AMICI CURIAE 1

STATEMENT 3

SUMMARY OF ARGUMENT 7

ARGUMENT 8

I. Congress has validly created judicially enforceable rights under FCRA 9

A. Congress has the power to create rights whose violation alone supports standing 9

B. FCRA creates substantive rights, the violation of which confers standing 14

C. Petitioner's arguments are unpersuasive 18

1. Historically, the violation of a right alone was an adequate basis for judicial relief 18

2. Contrary to Petitioner's contention, requiring a factual injury beyond the violation of a right for standing is unnecessary to protect the separation of powers 23

a. Injury-in-fact is unnecessary for constraining the judiciary for claims alleging violations of private rights 23

TABLE OF CONTENTS – Continued

Page

b. Injury-in-fact unjustifiably constrains Congressional authority... 26

D. Petitioner is wrong to invoke the clear-statement rule 29

II. Respondent Has Satisfied Article III's Injury-In-Fact Requirement By Alleging A "Concrete and Particularized" Invasion Of His Legally Protected Interests..... 32

CONCLUSION..... 34

TABLE OF AUTHORITIES

Page

CASES

Arbaugh v. Y&H Corp., 546 U.S. 500 (2006) 30

Arizona State Legislature v. Arizona Indep. Redistricting Comm'n, 135 S. Ct. 2652 (2015) 8, 10

ASARCO Inc. v. Kadish, 490 U.S. 605 (1989) 25

Atascadero State Hospital v. Scanlon, 473 U.S. 234 (1985) 30

Atkinson v. Teasdale, 95 Eng. Rep. 1054 (C.P. 1772) 20

Beaudry v. TeleCheck Servs., Inc., 579 F.3d 702 (6th Cir. 2009) 15

Bond v. United States, 134 S. Ct. 2077 (2014) 31

Boumediene v. Bush, 553 U.S. 723 (2008) 30, 31

Cable v. Rogers, 81 Eng. Rep. 259 (K.B. 1625) 20

Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793) 26

Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138 (2013) 11

Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821) 26

Crogate v. Morris, 123 Eng. Rep. 751 (C.P. 1611 21

DaimlerChrysler Corp. v. Cuno, 547 U.S. 332 (2006) 9, 32

Fed. Election Comm'n v. Akins, 524 U.S. 11 (1998) 11, 12

TABLE OF AUTHORITIES – Continued

Page

Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) 16

Gladstone Realtors v. Vill. of Bellwood, 441 U.S. 91 (1979) 14

Gregory v. Ashcroft, 501 U.S. 452 (1991) 30

Hamdan v. Rumsfeld, 548 U.S. 557 (2008) 31

Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982) 11, 12

Heckler v. Matthews, 465 U.S. 728 (1984) 12

Hein v. Freedom From Religion Found., Inc., 551 U.S. 587 (2007) 23

Hilton v. South Carolina Public Railways Commission, 502 U.S. 197 (1991) 29

Hodel v. Virginia Surface Min. & Reclamation Ass'n, Inc., 452 U.S. 264 (1981) 13

Jones v. United States, 529 U.S. 848 (2000) 29

Kucana v. Holder, 558 U.S. 233 (2010) 30, 31

Libertarian Party of N.H. v. Sec'y of State, 965 A.2d 1078 (N.H. 2008) 25

Linda R.S. v. Richard D., 410 U.S. 614 (1973) 10, 27

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) ..... *passim*

Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) 21, 24

Massachusetts v. EPA, 549 U.S. 497 (2007) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

Mayor of London v. Mayor of Lynn, 126 Eng. Rep. 1026 (H.L. 1796) 21

Muskrat v. United States, 219 U.S. 346 (1911) 23

Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1 (1981) 31

Planck v. Anderson, 101 Eng. Rep. 21 (K.B. 1792) 20

Raines v. Byrd, 521 U.S. 811 (1997) 23

Robert Marys's Case, 77 Eng. Rep. 895 (K.B. 1613) 20

Robinson v. Lord Byron, 30 Eng. Rep. 3 (1788) 20

Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208 (1974) 13

Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996) 30

Sierra Club v. Dep't of Transp., 167 P.3d 292 (Haw. 2007) 25

Sierra Club v. Morton, 405 U.S. 727 (1972) 10, 27

Steel Co. v. Citizens for a Better Env't, 523 U.S. 83 (1998) 18

Stuart Kingston, Inc. v. Robinson, 596 A.2d 1378 (Del. 1991) 25

Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180 (1997) 13

United States v. City of Philadelphia, 644 F.2d 187 (3d Cir. 1980) 27

TABLE OF AUTHORITIES – Continued

Page

United States v. Mattson, 600 F.2d 1295 (9th Cir. 1979) 28

Vt. Agency of Nat. Res. v. United States, 529 U.S. 765 (2000) 10, 18, 27, 31

Warth v. Seldin, 422 U.S. 490 (1975) 10, 27

Webb v. Portland Manufacturing Co., 29 F. Cas. 506 (C.C.D. Me. 1838) 22

Wells v. Watling, 96 Eng. Rep. 726 (C.P. 1778) 21

Woolton v. Salter, 83 Eng. Rep. 599 (C.P. 1683) 20

Wylie v. Birch, 114 Eng. Rep. 1011 (Q.B. 1843) 21

CONSTITUTIONAL PROVISIONS

U.S. CONST. amend. V 28

U.S. CONST. amend. XI 29

U.S. CONST. amend. XIV 28

U.S. CONST. art. I 30

U.S. CONST. art. II 31

U.S. CONST. art. III ..... *passim*

U.S. CONST. art. III, § 2 9

STATUTES

12 U.S.C. § 2607(d)(2) 3

15 U.S.C. § 1640 3

15 U.S.C. § 1640(a) 3

TABLE OF AUTHORITIES – Continued

Page

15 U.S.C. § 1681 ..... 4, 15, 16

15 U.S.C. § 1681(a)(1) 4

15 U.S.C. § 1681b(b)(1) 5

15 U.S.C. § 1681e(b) 5

15 U.S.C. § 1681e(d) 5

15 U.S.C. § 1681j(a)(1)(C) 5

15 U.S.C. § 1681n 9

15 U.S.C. § 1681n(a) 17, 29

15 U.S.C. § 1681n(a)(1) 5, 29, 33

15 U.S.C. § 1681n(a)(2) 5

15 U.S.C. § 1681n(a)(3) 5

15 U.S.C. § 1681s(c)(1)(B) 28

15 U.S.C. § 1692k 3

42 U.S.C. § 804 12

Fair Credit Reporting Act, 15 U.S.C. §§ 1681-1681x ..... *passim*

Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692-1692p 3

Fair Housing Act, Section 804(d), 42 U.S.C. § 3604(d) 11, 12

Real Estate Settlement Procedures Act of 1974, 12 U.S.C. §§ 2601-2617 3

Truth in Lending Act, 15 U.S.C. §§ 1601-1667f 3

TABLE OF AUTHORITIES – Continued

Page

RULES AND REGULATIONS

Fed. R. Civ. P. 12(b)(1) 6

Sup. Ct. R. 37.6 1

OTHER AUTHORITIES

1 J. G. SUTHERLAND, A TREATISE ON THE LAW OF DAMAGES §§ 9-10 (John R. Berryman ed., 4th ed. 1916) 22

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F. Andrew Hessick, *Cases, Controversies, and Diversity*, 109 NW. U. L. REV. 57 (2014) 25

F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275 (2008) 22, 32

Fair Credit Reporting: Hearings before the Subcomm. on Consumer Affairs of the House Comm. on Banking and Currency, 91st Cong., 2d Sess. 64-65 (1970) 17

Fair Credit Reporting: Hearings before the Subcomm. on Consumer Affairs of the House Comm. on Banking and Currency, 91st Cong., 2d Sess. 90 (1970) 16

HERBERT BROOM, COMMENTARIES ON THE COMMON LAW 101 (T. & J.W. Johnson & Co. 1856) 22

TABLE OF AUTHORITIES – Continued

Page

Hulle v. Orynge, Y.B. 6 Edw. 4, fol. 7, Mich., pl. 18 (1466), reprinted in A.K.R. KIRALFY, A SOURCE BOOK OF ENGLISH LAW 128-32 (1957) 20

Michael E. Solimine, *Congress, Separation of Powers, and Standing*, 59 CASE W. RES. L. Rev. 1023 (2009)..... 14

RALPH SUTTON, PERSONAL ACTIONS AT COMMON LAW 57 (1929) 19

Representative John Marshall, *Speech Delivered in the House of Representatives, of the United States, on the Resolutions of the Hon. Edward Livingston, Relative to Thomas Nash, Alias Jonathan Robbins* (March 7, 1800), THE PAPERS OF JOHN MARSHALL 82, 99 (Charles T. Cullen ed., 1984) 27

RESTATEMENT (SECOND) OF TORTS § 569 note 1.....16

S. Rep. No. 91-517 (1969) 4

THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 896 (3d ed. 1992).....31

THE SHORTER OXFORD ENGLISH DICTIONARY ON HISTORICAL PRINCIPLES 1319 (6th ed. 2007).....31

Virginia G. Maurer, *Common Law Defamation and the Fair Credit Reporting Act*, 72 GEO. L.J. 95 (1983).....17

WILLIAM BLACKSTONE, TRACTS, CHIEFLY RELATING TO THE ANTIQUITIES AND LAWS OF ENGLAND 15 (3d ed., Oxford, Claredon Press 1771).....19

WILLIAM BLACKSTONE, COMMENTARIES 19, 22

INTEREST OF AMICI CURIAE[1]

Amici are public law professors who teach and write in the areas of constitutional and administrative law and take a professional interest in the development of this Court's justiciability jurisprudence. Amici have an important interest in this case because they are concerned that the position advanced by Petitioners misconstrues this Court's precedent and would violate the separation of powers by unduly restricting Congress's authority to confer judicially enforceable rights by federal statute and the federal judiciary's authority to enforce those rights. More information about the specific interest of each law professor is provided below.

Todd Aagaard is Vice Dean and Professor of Law at the Villanova University School of Law. His teaching and research focuses on environmental law and administrative law.

Erwin Chemerinsky is the Dean and Distinguished Professor of Law at the University of California, Irvine School of Law. His areas of expertise are

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[1] In accordance with Rule 37.6, Amici certify that no counsel for either party authored this brief in whole or in part, and no person or entity other than named Amici made a monetary contribution for the preparation or submission of this brief. Letters of consent have been filed with the Clerk.

Further, the institutional affiliations of Amici are included for identification purposes only and are not meant to imply that the positions set forth herein represent the views of the institutions.

constitutional law, federal practice, civil rights and civil liberties, and appellate litigation.

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STATEMENT

1. Congress has enacted numerous statutes to protect consumers from unscrupulous business practices. *See, e.g.*, the Real Estate Settlement Procedures Act of 1974, 12 U.S.C. §§ 2601-2617 (RESPA) (regulating real estate settlement services); Truth in Lending Act, 15 U.S.C. §§ 1601-1667f (regulating creditor disclosures); Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692-1692p (regulating debt collectors). Many of these statutes contain private rights of action to allow individuals to seek redress against businesses that engage in prohibited practices. *See, e.g.*, 12 U.S.C. § 2607(d)(2) (RESPA); 15 U.S.C. § 1640 (Truth in Lending Act); 15 U.S.C. § 1692k (Fair Debt Collection Practices Act). These federal consumer protection statutes often provide that victimized consumers may recover the actual damages they suffered because of the unlawful act or an amount specified in the statute. *See, e.g.*, 12 U.S.C. § 2607(d)(2) (person who receives settlement kickbacks is liable to victim "in an amount equal to three times the amount of any charge paid for such settlement service"); 15 U.S.C. § 1640(a) (violator is liable to victim "in an

amount equal to the sum of any actual damage sustained by such person as a result of the failure [and] twice the amount of any finance charge in connection with the transaction").

One component of this set of consumer protections is the Fair Credit Reporting Act (FCRA), 15 U.S.C. §§ 1681-1681x, which regulates consumer credit reporting agencies. As the legislative history makes clear, one reason behind FCRA is "to prevent consumers from being unjustly damaged because of inaccurate or arbitrary information in a credit report." S. Rep. No. 91-517, at 1 (1969). Accordingly, FCRA explicitly states that it seeks to "require that consumer reporting agencies adopt reasonable procedures" to ensure that consumer information is produced "in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information." 15 U.S.C. § 1681.

FCRA and its legislative history further make clear that another, broader reason for FCRA's protections is to protect the "vital role played by credit reporting agencies in our economy." S. Rep. No. 91-517, at 1 (1969). As FCRA explicitly states, the "banking system is dependent upon fair and accurate credit reporting. Inaccurate credit reports directly impair the efficiency of the banking system, and unfair credit reporting methods undermine the public confidence which is essential to the continued functioning of the banking system." 15 U.S.C. § 1681(a)(1).

To achieve its purposes, FCRA confers various substantive rights on consumers against credit reporting agencies. FCRA prescribes procedures that consumer reporting agencies must follow in providing a "consumer report for employment purposes," such as obtaining written authorization for the report from the consumer. 15 U.S.C. § 1681b(b)(1). It also requires those agencies to "follow reasonable procedures to assure maximum possible accuracy of" consumer reports, *id.* § 1681e(b); to issue various notices regarding the information, *id.* § 1681e(d); and to post toll-free telephone numbers to request consumer reports *id.* § 1681j(a)(1)(C). *See* Pet. App. 4a-5a.

FCRA confers a private right of action against reporting agencies that fail to comply with these provisions. For "willful" violations of these provisions, a consumer whose rights under FCRA have been violated may receive "actual damages" or, in the alternative, he may receive statutory "damages of not less than $100 and not more than $1,000." *Id.* § 1681n(a)(1).[2]

2. Petitioner Spokeo Inc. operates a website that provides information about individuals. Through the website, users may learn about other individuals' marital status, wealth, and education. Pet. App. 1a-2a; J.A. 10.

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[2] The consumer may also seek punitive damages, 15 U.S.C. § 1681n(a)(2), and attorneys fees, *id.* § 1681n(a)(3).

Respondent Robins filed in federal district court a putative class action against Petitioner for willful violations of FCRA. Respondent alleged that Petitioner published inaccurate information about Respondent, overstating Respondent's education and financial situation and indicating that he is married although he is not. Pet. App. at 2a; J.A. 14. Respondent further alleged willful violations of the procedures for issuing reports, 15 U.S.C. § 1681b(b)(1), of the notice requirements, 1681e(d), and of the obligation to post telephone numbers, *id.* § 1681j(a)(1)(C).

The district court dismissed the complaint under Federal Rule of Civil Procedure 12(b)(1) for lack of Article III standing. Although acknowledging that Respondent had alleged a violation of his rights under FCRA, the court explained that Respondent lacked standing because he had "failed to allege that [Petitioner] has caused him any actual or imminent harm" as a consequence of those statutory violations. Pet. App. 13a.

The Ninth Circuit reversed. Although acknowledging that Respondent had not alleged a factual injury, the court explained that FCRA "does not require proof of actual damages" for willful violations of the sort alleged by Respondent and that "the violation of a statutory right is usually a sufficient injury in fact to confer standing." Pet. App. 6a. The court rejected the argument that, to have standing under Article III, a plaintiff must allege factual harm instead of merely the violation of a statutory right. It explained that Article III permits standing based

solely on the violation of a statutory right if, as in this case, the plaintiff alleges a violation of "his statutory rights and not just the rights of other people," and the interest protected by that statutory right is "individualized rather than collective." Pet. App. 8a.

SUMMARY OF ARGUMENT

Respondent has standing to vindicate his statutory rights to have consumer reporting agencies follow the procedures prescribed by FCRA when providing information about him. For a plaintiff to have Article III standing, he must demonstrate that he has suffered a concrete and particularized injury in the form of an invasion of a legally protected interest. That legally protected interest may derive from a statutorily created right. Congress accordingly may create new individual rights, the invasion of which support standing.

That understanding is consistent with historical practice. Common law courts traditionally adjudicated tort suits in which the plaintiff established only the violation of an individual right, even if that violation did not result in additional harm. It also properly maintains the separation of powers by limiting the federal courts to their traditional role of deciding on the rights of individuals and by allowing Congress to exercise its power of creating individual rights that are judicially enforceable.

Respondent satisfies the Article III injury requirement by alleging a concrete and particularized violation of his rights under FCRA. Contrary to Petitioner's assertion, allowing Respondent to vindicate his rights under FCRA does not threaten the Executive's power to Take Care that the laws are enforced. The Take Care clause assigns to the responsibility for vindicating public rights, not private individual rights such as the FCRA rights that Respondent alleges have been violated.

ARGUMENT

Respondent alleges that Petitioner has violated his rights under FCRA by publishing inaccurate credit reports about him, and by failing to follow statutorily prescribed procedures in creating and disseminating those reports. The alleged violation of rights conferred by FCRA constitutes an injury sufficient for Article III standing. As this Court recently reiterated, an actual "injury in the form of invasion of a legally protected interest that is concrete and particularized" constitutes an injury-in-fact under Article III. *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2663 (2015). This Court has further made clear that Congress can create new legally protected interests through the enactment of statutes. Here, Congress conferred on consumers the right to have credit agencies follow various procedures when publishing

credit reports, and respondent alleges that Petitioner violated his rights under FCRA.

I. Congress has validly created judicially enforceable rights under FCRA

FCRA gives consumers substantive statutory rights to various protections that consumer credit reporting agencies must observe and creates a private cause of action for consumers to seek redress for violations of those statutory rights. 15 U.S.C. § 1681n. In creating a private right to enforce FCRA and authorizing suit even when a violation of that right does not produce other consequential harm, Congress acted well within its constitutional authority.

A. Congress has the power to create rights whose violation alone supports standing

Article III of the Constitution extends the "judicial Power" of the United States to "Cases" and "Controversies." U.S. CONST. art. III, § 2. "Article III standing enforces the Constitution's case-or-controversy requirement." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006) (internal quotation marks omitted, alteration in original). For a plaintiff to have standing, he must show "injury in fact," which the Court has defined as "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of*

Wildlife, 504 U.S. 555, 560 (1992) (internal quotation marks omitted); *see also Arizona State Legislature*, 135 S. Ct. at 2663 (stating standing requires "injury in the form of invasion of a legally protected interest that is concrete and particularized and actual or imminent").

Because standing turns on the "invasion of a legally protected interest," this Court has long recognized that Congress may "define new legal rights, which in turn will confer standing to vindicate an injury caused to the claimant." *Vt. Agency of Nat. Res. v. United States*, 529 U.S. 765, 773 (2000); *see also, e.g., Warth v. Seldin*, 422 U.S. 490, 500 (1975) ("The actual or threatened injury required by Art. III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing. " (internal quotation marks omitted)); *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973) ("Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute."); *Sierra Club v. Morton*, 405 U.S. 727, 738 (1972) (Congress may "broaden[ ] the categories of injury that may be alleged in support of standing"); Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U.L. REV. 881, 885 (1983) (arguing that standing depends on "legal injury," which is "no more than the violation of a legal right, [which] can be created by the legislature").

Accordingly, congressional creation of a privately enforceable right is "of critical importance to the

standing inquiry" because "Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before." *Massachusetts v. EPA*, 549 U.S. 497, 516-17 (2007); *see also Fed. Election Comm'n v. Akins*, 524 U.S. 11, 22 (1998) (finding standing on the ground that "there is a statute which seek[s] to protect individuals such as respondents from the kind of harm they say they have suffered"). This power of Congress to define injuries that support standing is not limited to instances in which the violation of the right results in consequential harm. The violation of a congressionally created right itself may support standing, regardless whether that violation also results in additional harm.[3]

Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982), illustrates Congress's power to create private rights that support standing when they are violated. *Havens* involved alleged violations of Section 804(d) of the Fair Housing Act, which makes it unlawful "[t]o represent to any person because of race, that any dwelling is not available for inspection, sale, or

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[3] Petitioner argues, Pet. Br. 39, that allowing a violation of a right to constitute an injury supporting Article III standing obviates the other Article III standing requirements that the injury be "fairly traceable to the challenged action" and "redressable by a favorable ruling." *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013). Not so. A plaintiff still must show that the violation of the right can be fairly traced to the challenged action and that a court can likely redress the violation through a favorable ruling.

rental when such dwelling is in fact so available." 42 U.S.C. § 3604(d). One plaintiff in *Havens* was a black woman who sued a real estate company after she received false information about the availability of housing. Although the plaintiff did not intend to rent the apartment, *Havens*, 455 U.S. at 373, the Court nonetheless held that she had standing. Contrary to Petitioner's suggestion, Pet. Br. 41, the Court did not base its holding on the ground that the plaintiff had suffered a factual injury as a consequence of the misrepresentation. Instead, the basis for standing was that § 804 created an "enforceable right to truthful information" and the plaintiff had alleged injury to that "statutorily created right to truthful housing information." *Id.* at 373-74; *see also Akins*, 524 U.S. at 21 ("[T]his Court has previously held that a plaintiff suffers an 'injury in fact' when the plaintiff fails to obtain information which must be publicly disclosed pursuant to a statute."); *Heckler v. Matthews*, 465 U.S. 728, 737-40 (1984) (recognizing standing for a male social security beneficiary who challenged a provision granting higher benefits to females based on the violation of his "right" to receive benefits without regard to his sex).[4]

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[4] This Court has stated that cases recognizing Congress's ability to create standing through the creation of rights stand for the proposition that Congress may "elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law." *Lujan*, 504 U.S. at 578. But that conception of standing does not impose any limit on Congress's power to create rights whose violation supports standing,

(Continued on following page)

Further establishing Congress's authority to define injuries that will establish standing is the principle that courts should defer to legislative judgments. This Court has stressed that courts must accord "deference . to [Congress's] findings as to the harm to be avoided and to the remedial measures adopted for that end, lest [they] infringe on traditional legislative authority to make predictive judgments when enacting nationwide regulatory policy." *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 196 (1997). This deference derives in part "out of respect for [Congress's] authority to exercise the legislative power" under the Constitution, *id.*, and in part from the reality that Congress "is far better equipped than the judiciary to 'amass and evaluate the vast amounts of data' bearing upon" legislative questions. *Id.* at 195; *see also, e.g., Hodel v. Virginia Surface Min. & Reclamation Ass'n, Inc.*, 452 U.S. 264, 283 (1981) ("[T]he effectiveness of existing laws in dealing

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because, in enacting legislation, Congress determines the factual injury that it seeks to prevent. *See Massachusetts*, 549 U.S. at 516-17 ("Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before." (quoting *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in the judgment))). Moreover, this Court has held that statutes may create rights that establish standing even if they are "directed at avoiding circumstances of potential, not actual, impropriety." *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 224 n.14 (1974). The factual injury that the procedural rights conferred by the FCRA seek to prevent is the potential that credit agencies will generate inaccurate reports about that consumer.

with a problem identified by Congress is ordinarily a matter committed to legislative judgment."); Michael E. Solimine, *Congress, Separation of Powers, and Standing*, 59 CASE W. RES. L. REV. 1023, 1054-55 (2009) (arguing that "federal courts should give some level of deference to Congress statutorily addressing the standing of potential plaintiffs").

To be sure, despite its power to define injuries for standing, Congress cannot "abrogate the Art. III minima" of standing. *Gladstone Realtors v. Vill. of Bellwood*, 441 U.S. 91, 100 (1979). Thus, the congressionally created right giving rise to standing must be "concrete and particularized." *Lujan*, 504 U.S. at 560. Congress cannot confer standing on citizens whose only interest is "to vindicate the public's nonconcrete interest in the proper administration of the laws." *Massachusetts*, 549 U.S. at 517 (quoting *Lujan*, 504 U.S. at 581 (Kennedy, J., concurring in part and concurring in the judgment)). For instance, Congress cannot authorize "any person" to sue for any violation of a statute. *Lujan*, 504 U.S. at 572. Instead, "Congress must at the very least identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit." *Massachusetts*, 549 U.S. at 516.

B. FCRA creates substantive rights, the violation of which confers standing

Application of these principles establishes that Congress validly authorized individuals to bring suit

in federal court based solely on the violation of their rights under FCRA. By conferring on consumers substantive rights against credit agencies and creating a cause of action for consumers to enforce those rights, Congress exercised its power "to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before." *Massachusetts*, 549 U.S. at 516-17. The deprivation of that statutory right under FCRA constitutes a valid injury conferring standing, regardless whether the consumer suffers additional consequential damages. *See Beaudry v. TeleCheck Servs., Inc.*, 579 F.3d 702, 705 (6th Cir. 2009) (Sutton, J.) (holding that FCRA "does not require a consumer to wait for consequential harm before enforcing her statutory rights").

Congress's decision to confer that privately enforceable right on consumers who suffer no harm other than violation of their rights is entitled to judicial deference. Congress explicitly stated in FCRA its finding that "[i]naccurate credit reports directly impair the efficiency of the banking system, and unfair credit reporting methods undermine the public confidence which is essential to the continued functioning of the banking system." 15 U.S.C. § 1681. Congress opted to address the risk of inaccurate reports in part by creating privately enforceable protections for consumers against credit agencies, and it chose not to require consumers to prove harm other than a violation of their FCRA rights, instead

affording statutory damages for willful violations of those rights.

That decision corresponds to the reality that any inaccuracies about credit, even ones that benefit the object of the credit report, are detrimental to the banking system and undermine public confidence in banks. *See* 15 U.S.C. § 1681 (stating that "[i]naccurate credit reports directly impair the efficiency of the banking system"). It is also consistent with the aim that a "consumer be assured a minimum damage recovery," *Fair Credit Reporting: Hearings before the Subcomm. on Consumer Affairs of the House Comm. on Banking and Currency*, 91st Cong., 2d Sess. 90 (1970) (statement of Anthony Z. Roisman, General Counsel, Consumer Federation of America), even when the harm from a false credit report is small or difficult to prove.

The decision to confer statutory damages without proof of harm is also consistent with the common law rule of imposing liability for *per se* libel without proof of harm. RESTATEMENT (SECOND) OF TORTS § 569 note 1; *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974) ("Under the traditional rules pertaining to actions for libel, the existence of injury is presumed from the fact of publication."). Like *per se* libel, FCRA does not require proof of harm, instead awarding statutory damages for any willful violation of a procedure designed to produce accurate credit reports. To be sure, as Petitioner notes, Pet. Br. 51, *per se* libel was limited to falsehoods exposing the victim to "hatred, contempt, or ridicule." *Gertz*, 418 U.S. at 370 (White,

J., dissenting). Nevertheless, the similarity between *per se* libel and FCRA reinforces the conclusion that proof of damages is not necessary in suits alleging willful violations of FCRA.[5]

The rights conferred by FCRA are also "individualized" and "concrete." *Lujan*, 504 U.S. at 560. FCRA does not purport to establish a public right in citizens "to vindicate the public's nonconcrete interest in the proper administration of the laws." *Massachusetts*, 549 U.S. at 517. It does not, for example, authorize "any person" to sue for any violations of FCRA. *Cf. Lujan*, 504 U.S. at 572. Instead, it confers on each consumer the personal right to have agencies observe particular procedures in generating and disseminating credit reports *about that person*. It does not authorize anyone to bring suit for those violations; instead, a credit agency is liable only "to that consumer" whose FCRA rights have been violated. 15 U.S.C. § 1681n(a). The violation of those FCRA rights,

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[5] The common law presumed damages in defamation actions for credit inaccuracies, but in the late nineteenth century, states began to require proof of actual damages. *See* Virginia G. Maurer, *Common Law Defamation and the Fair Credit Reporting Act*, 72 GEO. L.J. 95, 99-101 (1983). This change made recovery difficult. Testimony before Congress noted this limitation and others of the state remedy, *see, e.g.*, *Fair Credit Reporting: Hearings before the Subcomm. on Consumer Affairs of the House Comm. on Banking and Currency*, 91st Cong., 2d Sess. 64-65 (1970) (testimony of Prof. Alan F. Westin); *id.* at 148-50 (statement of John H. Lashly, General Counsel for Associated Credit Bureaus, Inc.), and presumed damages for willful violations of FCRA combat some of those difficulties.

regardless of the consequences of that violation, constitutes an individualized, concrete harm for the person whose rights have been violated.

C. Petitioner's arguments are unpersuasive

Petitioner argues that Article III limits standing to plaintiffs who suffer a factual injury separate from the violation of statutory right and, therefore, Congress cannot authorize federal actions for plaintiffs who suffer the violation of a right without an additional factual harm. Petitioner offers two primary arguments in support of this theory: first, Article III incorporates the historical requirement of injury-in-fact; second, requiring a factual injury is necessary to preserve the separation of powers. Neither argument is well taken.

1. Historically, the violation of a right alone was an adequate basis for judicial relief

This Court has stated that Article III limits the judicial power to resolving disputes that were "'traditionally amenable to, and resolved by, the judicial process.'" *Vt. Agency*, 529 U.S. at 774 (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102 (1998)). Petitioner argues that, historically, a factual harm was a necessary element of any judicial dispute – the violation of a legal right by itself did not suffice. Pet. Br. 21.

The English legal system traditionally distinguished between public and private rights. Public rights were those held by the community. *See* 4 WILLIAM BLACKSTONE, COMMENTARIES *5 (referring to "the public rights and duties, due to the whole community, considered as a community, in its social aggregate capacity"). By contrast, private rights were rights held by individuals. *See* 1 *id.* at *117-41 (discussing "absolute" private rights to life liberty, and property); 1 *id.* at *119 (discussing "relative" private rights acquired by "members of society"). The victim of a violation of private right could seek a remedy for that violation by bringing the appropriate form of action, such as a writ of trespass. *See* WILLIAM BLACKSTONE, TRACTS, CHIEFLY RELATING TO THE ANTIQUITIES AND LAWS OF ENGLAND 15 (3d ed., Oxford, Claredon Press 1771) (discussing "[t]he remedial [part of law]; or method of recovering private rights, and redressing private wrongs").

As Petitioner suggests, Pet. Br. 21, private rights developed to protect against particular harms. But the existence of the harm was not essential to maintaining an action for the violation of a right. To the contrary, the violation of a legal right by itself was an adequate basis for some actions. For example, a plaintiff could bring a writ for trespass, which was the action to remedy a direct, forceful invasion of rights, even if the invasion did no harm. *See* RALPH SUTTON, PERSONAL ACTIONS AT COMMON LAW 57 (1929) ("[I]f trespass lies the plaintiff has only to prove the commission of the wrong [and] is entitled to

succeed, even if he proves no actual damage, as in trespass damage is presumed."). Thus, in *Hulle v. Orynge*, Y.B. 6 Edw. 4, fol. 7, Mich., pl. 18 (1466), reprinted in A.K.R. KIRALFY, A SOURCE BOOK OF ENGLISH LAW 128-32 (1957), it was held that an individual could maintain an action in trespass against his neighbor who had entered the plaintiff's land to collect thorns that had blown there, even though the entry had caused no damage. An individual who suffered a violation of rights that did not result in factual harm could bring an action for nominal damages. *See, e.g., Robinson v. Lord Byron*, 30 Eng. Rep. 3, 3 (1788) (recounting award of nominal damages where the plaintiff proved that the riparian rights had been invaded but failed to offer proof of damage).

To be sure, legal injury itself was not sufficient for all actions. For example, to maintain an action on the case, the plaintiff needed to demonstrate both legal injury and damage. All but two of the cases cited by Petitioner stating that plaintiff must prove legal injury and damages presented actions on the case, *see Robert Marys's Case*, 77 Eng. Rep. 895, 898 (K.B. 1613); *Atkinson v. Teasdale*, 95 Eng. Rep. 1054, 1059 (C.P. 1772) (de Grey, C.J.); *Woolton v. Salter*, 83 Eng. Rep. 599, 599 (C.P. 1683); *Cable v. Rogers*, 81 Eng. Rep. 259, 259 (K.B. 1625); *Planck v. Anderson*, 101 Eng. Rep. 21, 23 (K.B. 1792); the other two cases cited by Petitioner likewise involved non-trespassory

actions that required proof of damages.[6] The requirement of damages in those types of actions did not extend to actions in trespass.

In any event, in the 18th century, courts moved towards abandoning the requirement of damages in actions on the case, instead concluding that the violation of rights alone warranted relief. *See, e.g.*, *Wells v. Watling*, 96 Eng. Rep. 726, 727 (C.P. 1778) (de Grey, C.J.) (stating in an action on the case that "[i]t [was] sufficient if the right be injured"); *Mayor of London v. Mayor of Lynn*, 126 Eng. Rep. 1026, 1041 (H.L. 1796) (Eyre, C.J.) (stating that "damage to the right [is] sufficient to warrant the owner in asserting the right against the party infringing it"). Early decisions in the United States adopted this rule that the violation of a right alone supports an action. Thus, in *Marbury v. Madison*, Chief Justice Marshall stated that "it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded." 5 U.S. (1 Cranch) 137, 163 (1803)

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[6] In *Crogate v. Morris*, 123 Eng. Rep. 751, 751 (C.P. 1611), the Court drew a distinction between the lord, who has an action for trespass on the common against any stranger who enters, and the commoner has no action unless he "lose [his] common." In *Wylie v. Birch*, 114 Eng. Rep. 1011, 1016 (Q.B. 1843), the Court indicated that damages is an element of the cause of action for breach of the Sheriff's duty to levy goods. *Id.* at 1016 ("[D]enial of damage is a denial that the defendant neglected his duty to the plaintiff's injury, and consequently of the cause of action.").

(quoting 3 BLACKSTONE, at *23); *see also* HERBERT BROOM, COMMENTARIES ON THE COMMON LAW 101 (T. & J.W. Johnson & Co. 1856) (observing that "*injuria sine damno* does very frequently suffice as the foundation of an action" and providing a number of examples).

As in England, courts in the United States concluded that nominal damages was the appropriate award for the violation of a right that did not cause any actual damages. For example, in *Webb v. Portland Manufacturing Co.*, which involved a dispute about the diversion of a stream, Circuit Justice Story stated that "[a]ctual, perceptible damage is not indispensible as the foundation of an action." Instead, he explained, "wherever there is a wrong, there is a remedy to redress it; and every injury imports damage in the nature of it; and, if no other damage is established, the party injured is entitled to a verdict for nominal damages." 29 F. Cas. 506, 508 (C.C.D. Me. 1838) (No. 17,322); *see generally* F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275, 286 (2008) (gathering cases). Since that time, courts have continued to award plaintiffs nominal damages to vindicate violations of their private rights even when those violations resulted in no harm. *See* 1 J. G. SUTHERLAND, A TREATISE ON THE LAW OF DAMAGES §§ 9-10 (John R. Berryman ed., 4th ed. 1916) (gathering cases awarding nominal damages).

2. Contrary to Petitioner's contention, requiring a factual injury beyond the violation of a right for standing is unnecessary to protect the separation of powers

Petitioner argues that requiring a factual injury for Article III is necessary to ensure that both the federal judiciary and Congress do not exceed the bounds of their authority under the Constitution. Petitioner is incorrect.

a. Injury-in-fact is unnecessary for constraining the judiciary for claims alleging violations of private rights

Petitioner argues that limiting standing to plaintiffs who have suffered a factual harm, instead of merely the violation of a substantive right, is necessary to achieve the "overriding and time honored concern about keeping the judiciary's power within its proper constitutional sphere." Pet. Br. 27 (quoting *Raines v. Byrd*, 521 U.S. 811, 820 (1997)). But a factual injury is not necessary to confine the judiciary to its proper role. As this Court has repeatedly noted in standing cases, the "province" of the courts is to "decide on the rights of individuals." *Lujan*, 504 U.S. at 576 (1992); *accord Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587, 598 (2007) (plurality); *id.* at 636 (Scalia, J., concurring in the judgment); *see also Muskrat v. United States*, 219 U.S. 346, 357 (1911) ("By cases and controversies are intended the

claims of litigants brought before the courts for determination by such regular proceedings as are established by law or custom for the protection or enforcement of rights. "). Claims that allege violations of individual rights therefore fall squarely within the constitutional sphere of judicial power, irrespective whether the violations also resulted in factual harm.

Indeed, this Court has made clear that the purpose of the injury-in-fact requirement is to ensure that the judiciary only decides on rights of individuals. *Lujan*, 504 U.S. at 577 (stating that "the concrete injury requirement" enforces the "fundamental principle of confining courts to the 'province' of 'decid[ing] on the rights of individuals'" (quoting *Marbury*, 5 U.S. at 170)). That requirement may be critical for claims that do not rest on traditionally conceived private rights, such as actions challenging rulemaking by administrative agencies. But in cases that allege violations of individual rights, the injury-in-fact requirement is superfluous, because the case already involves the rights of individuals.

This Court's standing decisions make clear that the federal judiciary exceeds its proper sphere when it resolves disputes involving generalized violations of public rights. *Lujan*, 504 U.S. at 573-74 ("We have consistently held that a plaintiff raising only a generally available grievance about government does not state an Article III case or controversy."). Those generalized grievances, the Court has said, should be asserted in the political branches. *Lujan*, 504 U.S. at

576. But recognizing standing based on the violation of individual rights, even when that violation does not cause additional harm, does not empower courts to hear generalized grievances. The violation of a private right is an individualized injury; only the individual whose right has been violated suffers the legal injury.

Prohibiting federal courts from hearing claims brought by individuals whose rights under FCRA have been violated but who have suffered no further harm would have the anomalous consequence of forcing those individuals into state court to vindicate their rights. State courts are not bound by Article III, *see ASARCO Inc. v. Kadish*, 490 U.S. 605, 617 (1989), and many have adopted standing rules that differ from the federal ones, *see, e.g.*, *Libertarian Party of N.H. v. Sec'y of State*, 965 A.2d 1078, 1080 (N.H. 2008) ("In evaluating whether a party has standing to sue, we focus on whether the party suffered a legal injury against which the law was designed to protect."); *Stuart Kingston, Inc. v. Robinson*, 596 A.2d 1378, 1382 (Del. 1991) ("Standing [is] a matter of self-restraint. "); *Sierra Club v. Dep't of Transp.*, 167 P.3d 292, 312 (Haw. 2007) (describing "standing doctrine" as "prudential rules of judicial self-governance"); *see generally* F. Andrew Hessick, *Cases, Controversies, and Diversity*, 109 Nw. U. L. Rev. 57, 67-68 (2014) (cataloguing state standing rules and demonstrating their divergence from Article III standing rules).

It strains credulity to think that Congress meant to leave a substantial portion of FCRA enforcement exclusively to the state courts, and barring federal courts under Article III from hearing FCRA claims is inconsistent with the general rule that the powers of the branches of the federal government are commensurate under the Constitution. *See Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 384 (1821) ("[T]he judicial power of every well constituted government must be co-extensive with the legislative, and must be capable of deciding every judicial question which grows out of the constitution and laws."); *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 435-36 (1793) (opinion of Iredell, J.) (stating that, except when jurisdiction depends on the identity of the parties, the judiciary is "commensurate with the ordinary Legislative and Executive powers of the general government").

b. Injury-in-fact unjustifiably constrains Congressional authority

Petitioner argues that requiring a factual injury for standing is also necessary to limit the power of Congress. According to Petitioner, if Congress could authorize standing for private individuals based solely on violations of private rights that do not result in further harm, Congress could effectively transfer from the President to private citizens the President's power to take care that the laws are enforced. Pet. Br. 28-29. Petitioner is mistaken.

Under the Constitution, Congress has the authority to create new substantive rights for individuals, and the violation of those individual rights constitutes an injury that supports standing. *See Vt. Agency*, 529 U.S. at 773; *Warth*, 422 U.S. at 500; *Linda R.S.*, 410 U.S. at 617 n.3; *Sierra Club*, 405 U.S. at 738.

Contrary to Petitioner's claim, suits brought by individuals seeking redress for violations of their individual rights do not threaten the Executive power to Take Care that the laws are enforced. The Take Care power confers on the President the responsibility to vindicate public rights. *See Lujan*, 504 U.S. at 576 ("Vindicating the *public* interest (including the public interest in Government observance of the Constitution and laws) is the function of Congress and the Chief Executive."). It does not authorize the President to vindicate private, individual rights. The decision whether to vindicate those individual rights rests with the individuals whose rights have been violated. *See, e.g.*, Representative John Marshall, *Speech Delivered in the House of Representatives, of the United States, on the Resolutions of the Hon. Edward Livingston, Relative to Thomas Nash, Alias Jonathan Robbins* (March 7, 1800), in 4 THE PAPERS OF JOHN MARSHALL 82, 99 (Charles T. Cullen ed., 1984) ("A private suit instituted by an individual, asserting his claim to property, can only be controlled by that individual. The executive can give no direction concerning it."); *see also United States v. City of Philadelphia*, 644 F.2d 187, 199-201 (3d Cir. 1980)

(refusing to imply action for United States to vindicate private rights); *United States v. Mattson*, 600 F.2d 1295, 1297 (9th Cir. 1979) (same). Because the Executive does not have the inherent power to bring suit to vindicate private rights, a suit by an individual to vindicate a violation of his individual right does not impinge on the Executive power.[7]

To be sure, Congress cannot circumvent the Take Care Clause by creating private rights that do nothing more than vindicate "the undifferentiated public interest in executive officers' compliance with the law." *Lujan*, 504 U.S. at 577.[8] But the rights conferred by the FCRA are not of that sort. FCRA does not authorize individuals to seek executive compliance with the law. Instead, it confers on each individual consumer various rights to protect against inaccurate credit reports. Those procedural rights are individualized in the same way that the procedural rights protecting against deprivations of life, liberty, or property without due process are individualized. *See* U.S. CONST. amend. V, XIV.

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[7] Congress may authorize the government to bring suit to remedy injuries suffered by individuals. For example, § 1681s(c)(1)(B) authorizes States to bring suit on behalf of their residents for willful violations of FCRA. But that authorization does not limit the ability of individuals to bring suit to enforce their individual rights under FCRA.

[8] Nor can Congress create rights that violate other provisions of the Constitution; for example, Congress cannot create a right to seek impeachment of federal officers, because the Constitution confers that power exclusively on the House.

Nor does FCRA seek to turn private individuals into quasi-executive officials by authorizing them to bring suit for violations of FCRA rights of others. Under FCRA, only "that consumer" whose FCRA rights have been violated may bring suit for statutory damages. 15 U.S.C. § 1681n(a).

D. Petitioner is wrong to invoke the clear-statement rule

Petitioner's clear-statement argument, *see* Pet. Br. 53, should be rejected.

First, as shown above, Congress acted well within the boundaries of Article III in creating a private right of action through 15 U.S.C. § 1681n(a)(1). Because no constitutional boundary is approached, Petitioner cannot invoke the clear-statement rule. *See, e.g.*, *Hilton v. South Carolina Public Railways Commission*, 502 U.S. 197, 209-10 (1991) (O'Connor, J., dissenting) ("[I]n the cases in which we have employed the clear statement rule outside the Eleventh Amendment context, we have recognized the rule's constitutional dimensions." (citations omitted)).[9]

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[9] It might be argued that the constitutional avoidance canon, *see Jones v. United States*, 529 U.S. 848, 857 (2000), requires this Court to interpret § 1681n(a)(1) as incorporating an injury-in-fact criterion, thus avoiding a potential Article III problem. Given that Article III does not limit Congress's ability to create private rights whose violation alone supports standing, *see supra* Part I.A, the constitutional avoidance canon does not apply.

But even if this Court were to determine that the FCRA's private right of action approaches the margins of Article III, Petitioner's clear-statement argument would still fail. This Court has required Congress to satisfy a clear-statement requirement in only two general categories of cases under Article III. First, this Court has required Congress to speak clearly when it intended to *deny* access to the federal courts. *See, e.g.*, *Boumediene v. Bush*, 553 U.S. 723, 738 (2008) (stating that Congress must speak clearly if it intends to suspend the writ of habeas corpus); *Kucana v. Holder*, 558 U.S. 233, 237 (2010) (Congress must speak clearly if it intends to deny judicial review of agency action); *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 515-16 (2006) (Congress must speak clearly if it intends to make a statutory provision jurisdictional). Second, this Court has required a clear statement when Congress purports to waive State sovereign immunity. *See, e.g.*, *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 55-56 (1996); *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 238-39 (1985).

This Court has never even mentioned the clear-statement rule in the context of Article III standing, as the cases cited in Petitioner's Brief make clear: none of them involves Article III standing.[10] To be

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[10] *See* Pet. Br. 53-54. Most of the cases Petitioner cites have nothing to do with Article III. *See Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (holding that Congress must speak clearly when it uses its Article I powers to alter the traditional federal-state

(Continued on following page)

sure, this Court has suggested that, in exercising its power to define injuries that will support Article III standing, "Congress must at the very least identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit." *Massachusetts*, 549 U.S. at 516 (quoting *Lujan*, 504 U.S. at 580-81 (Kennedy, J., concurring)). But this requirement that Congress "identify" injuries obligates Congress only to "recognize" or "establish" an injury. *See, e.g.*, THE SHORTER OXFORD ENGLISH DICTIONARY ON HISTORICAL PRINCIPLES 1319 (6th ed. 2007); THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 896 (3d ed. 1992). That requirement comes nowhere near a mandate of "an unmistakably clear statement." *Hamdan v. Rumsfeld*, 548 U.S. 557, 575 (2008).

It is conceivable – though we still would think it problematic – to apply the clear-statement rule to a statutory provision conferring standing-to-sue in a context involving significant separation-of-powers concerns. For example, this Court has suggested, but never resolved, possible Article II problems with certain Congressional conferrals of standing. *See, e.g.*, *Vt. Agency*, 529 U.S. at 778 n.8. But even if an

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balance of powers); *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) (same); *Bond v. United States*, 134 S. Ct. 2077, 2089 (2014) (same). The cases that *do* have something to do with Article III run counter to Petitioner's position. *See Boumediene*, 553 U.S. at 723 (holding that Congress must state clearly its intention to *deny* access to the federal courts); *Kucana*, 558 U.S. at 237 (same).

argument for the clear-statement rule is colorable in an Article III standing case arising in a separation-of-powers context, it is not colorable here. Standing for one *private* party to sue another *private* party based on the violation of *private* statutory rights does not threaten the Constitution's separation of powers. *See supra* Part I.C.2.a. As one of us has argued elsewhere, standing doctrine has no application to plaintiffs alleging the violation of private rights. *See generally* F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275 (2008).

Petitioner thus requests an unprecedented and unjustified application of the clear-statement rule. That request should be rejected.

II. Respondent Has Satisfied Article III's Injury-In-Fact Requirement By Alleging A "Concrete and Particularized" Invasion Of His Legally Protected Interests

To have standing to seek a remedy for an "injury to a cognizable interest," "the party seeking review" must "be himself among the injured." *Lujan*, 504 U.S. at 563. Moreover, that injury not only must be to a "legally protected interest." *Id.* at 560. It also must be "concrete" and "particularized" – meaning that it must affect the plaintiff in a "personal and individual way." *Id.* The injury thus cannot be merely a generalized "grievance that [plaintiff] suffers in some indefinite way in common with people generally." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 344 (2006). Respondent satisfies these requirements.

The injury on which respondent bases his standing is a violation by Petitioner of Respondent's rights under FCRA. The rights created by FCRA are not held by the public generally. FCRA confers on each consumer the right to have credit agencies follow certain procedures in generating and disseminating a credit report relating to that consumer, and it authorizes only the consumer whose rights have been violated to seek redress for that violation. *See* 15 U.S.C. § 1681n(a)(1).

Respondent alleges that Petitioner violated his rights under FCRA by creating and disseminating credit reports with inaccuracies about him and by failing to follow the procedures required by FCRA when disseminating his credit report. J.A. 14-23. That injury is to the legally cognizable interests that FCRA creates in individuals to having credit agencies follow certain procedures when publishing credit reports about those individuals. The injury is concrete and personal to Respondent. He alleges a violation of *his* rights under FCRA, not the rights of another individual, resulting from Petitioner's failure to follow FCRA's prescribed procedures when publishing credit information about him.[11] Respondent's allegations therefore establish his standing.

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[11] Respondent alleges similar injuries to other members of the class in this class action, but he does not base his standing on those injuries to other individuals.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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REPLY BRIEF

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IN THE
Supreme Court of the United States

SPOKEO, INC., *Petitioner*,
v.
THOMAS ROBINS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, *Respondent*.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF RESTITUTION AND REMEDIES SCHOLARS AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

This brief principally addresses the question of how petitioner's proposed standing rule would affect longstanding and well established causes of action for restitution and unjust enrichment.

TABLE OF CONTENTS

Table of Authorities iv

Interest of Amici 1

Summary of Argument 1

Argument 4

I. Standing Often Does Not Require Plaintiffs to Establish Any Harm Beyond the Violation of Their Legal Rights. 4

A. Restitution and Unjust Enrichment Is Based on Defendant's Gain, Not Plaintiff's Loss 4

B. Many Familiar Causes of Action for Unjust Enrichment Do Not Require Plaintiffs to Establish Harm Beyond the Violation of Their Legal Rights. 6

1. Commercial Bribes and Kickbacks. 7

2. Business Opportunities. 8

3. Other Conflicts of Interest. 9

4. Misuse of Confidential Information. 11

5. Forfeiture of Fees. 12

6. Infringement of Intellectual Property. 13

7. Trespass. 15

8. Conversion. 16

9. Rescission. 17

10. The Slayer Rule. 17

C. Some Torts Are Actionable for Damages Without Evidence of Harm Beyond the Violation of Plaintiff's Rights. 19

D. These Causes of Action Long Predate the American Founding.. 20

E. Founding-Era Plaintiffs Could Recover Statutory Damages or Penalties Without Evidence of Harm. 21

F. Petitioner's Proposed Rule -- Especially If Broadly Stated — Would Disrupt Large Bodies of Long-Established Law. 22

II. The Requirements of Standing Necessarily Depend on the Relief Plaintiff Seeks. 24

A. Standing in Suits for Damages and Injunctions. 24

B. Standing in Suits for Restitution and Unjust Enrichment. 25

C. Standing in Claims Specific to an Individual Plaintiff or General to the Whole Public. 28

III. Petitioner Obfuscates What It Means by Injury and Harm.. 31

Conclusion 35

Appendix: Identifying the Amici A-1

TABLE OF AUTHORITIES

Cases

Atcheson v. Everitt,
98 Eng. Rep. 1142 (K.B. 1775) 22

Burrow v. Arce, 997 S.W.2d 229 (Tex. 1999) 13

Calcraft v. Gibbs, 101 Eng. Rep. 11 (K.B. 1792) 21

Carey v. Piphus, 435 U.S. 247 (1978) 33-34

City of Los Angeles v. Lyons,
461 U.S. 95 (1983) 3, 24

Clapper v. Amnesty International USA,
133 S. Ct. 1138 (2013) 30

Diamond v. Oreamuno,
248 N.E.2d 910 (N.Y. 1969) 12

Edwards v. Lee's Administrator,
96 S.W.2d 1028 (Ky. 1936) 15-16

Ex parte Lacey, 31 Eng. Rep. 1228 (Ch. 1802) 20-21

Fuchs v. Bidwill, 359 N.E.2d 158 (Ill. 1976) 27

Gollust v. Mendell, 502 U.S. 115 (1991) 25-26

Great-West Life & Annuity Insurance Co. v. Knudson, 534 U.S. 204 (2002) 4

Havens Realty Corp. v. Coleman,
455 U.S. 363 (1982) 30, 33

Jackson v. Smith, 254 U.S. 586 (1921) 7, 10

Keech v. Sandford,
25 Eng. Rep. 223 (Ch. 1726) 8-9, 20

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992) 3, 28-29, 31, 33

Lum v. Clark, 57 N.W. 662 (Minn. 1894) 8

Lum v. McEwen, 56 Minn. 278 (1894) 8

Maier Brewing Co. v. Fleischmann Distilling Corp., 390 F.2d 117 (9th Cir. 1968) 14

MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118 (2007) 24-25

Meinhard v. Salmon, 164 N.E. 545 (N.Y. 1928) 9

Mishawaka Rubber & Woolen Mfg. Co. v. S.S. Kresge Co., 316 U.S. 203 (1942) 14-15

Mobil Oil Exploration & Producing Southeast, Inc. v. United States, 530 U.S. 604 (2000) 17

Mosser v. Darrow, 341 U.S. 267 (1951) 10-11

Olwell v. Nye & Nissen Co., 173 P.2d 652 (Wash. 1946) 7, 16

Petrella v. Metro-Goldwyn-Mayer, Inc., 134 S. Ct. 1962 (2014) 14

Public Citizen v. United States Department of Justice, 491 U.S. 440 (1989) 32

Raven Red Ash Coal Co. v. Ball, 39 S.E.2d 231 (Va. 1946) 15

SEC v. Warde, 151 F.3d 42 (2d Cir. 1999) 12

Sheldon v. Metro-Goldwyn Pictures Corp., 309 U.S. 390 (1940) 14

Slay v. Burnett Trust, 187 S.W.2d 377 (Tex. 1945) 11

Snepp v. United States, 444 U.S. 507 (1980) 12

Summers v. Earth Island Institute, 555 U.S. 488 (2009) 24, 27-28

Tarnowski v. Resop,
51 N.W.2d 801 (Minn. 1952) 7-8

Tull v. United States, 481 U.S. 412 (1987) 21

Three Boys Music Corp. v. Bolton,
212 F.3d 477 (9th Cir. 2000) 13

United States v. Carter, 217 U.S. 286 (1910) 8

United States v. Podell, 572 F.2d 31 (2d Cir. 1978) ... 8

Vermont Agency of Natural Resources v. United States ex rel. Stevens, 529 U.S. 765 (2000) 28

Warth v. Seldin, 422 U.S. 490 (1975) 29

Whelpdale v. Cookson,
27 Eng. Rep. 856 (Ch. 1747) 10, 20

Whelpdale v. Cookson,
28 Eng. Rep. 440 (Ch. 1747) 20

Constitutions and Statutes

U.S. Constitution

Article III 26, 33

Amendment IV 31

Copyright Act

An Act for the Encouragement of Learning,
1 Stat. 124 (1790) 22

15 U.S.C. §504(b) 13

Fair Credit Reporting Act

15 U.S.C. §1681e(b) 30

15 U.S.C. §1681n(a) 30

Fair Housing Act, 42 U.S.C. §3604(d) 30

Freedom of Information Act, 5 U.S.C. §552 ..... 32, 34

Lanham Act, 15 U.S.C. §1117(a) 13

Patent Act

35 U.S.C. §284 13

35 U.S.C. §289 13

Securities & Exchange Act,
15 U.S.C. §78p(b) 25-26

Uniform Trade Secrets Act 12-13

Secondary Authorities

American Law Institute,
Principles of Corporate Governance (1992)

Section 5.04 11-12

Section 5.05 9

Section 5.12 9

American Law Institute,
Restatement (Third) of Agency (2006)

Section 8.01 ..... 10, 12

Section 8.02 ..... 7, 9

American Law Institute, *Restatement (Third)
of the Law Governing Lawyers* (2000) 12-13

American Law Institute,
Restatement of Restitution (1937) 5

American Law Institute,
Restatement (Second) of Restitution (1983) 5

American Law Institute, *Restatement (Third)
of Restitution and Unjust Enrichment* (2011)

generally 1

Section 1 ..... 5, 26

Section 3 5-6
Section 37 17
Section 40 15-16
Section 42 13
Section 43 ..... 7, 9-10, 12
Section 44 7
Section 45 ..... 17-18, 27
Section 51 15

American Law Institute,
Restatement (Second) of Torts (1965)
Section 7 19
Section 18 19
Section 21 19
Section 35 19
Section 158 19
Section 163 19
Section 218 19

Dan B. Dobbs, *Law of Remedies* (2d ed. 1993) 4

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(2d ed. 2011) 19-20, 33

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INTEREST OF AMICI

Amici are law professors and practicing lawyers who study restitution, remedies, or both. One amicus was the Reporter for the *Restatement (Third) of Restitution and Unjust Enrichment*, and eight served as Advisers or on the Members Consultative Group for that *Restatement*. Individual amici are further identified in the Appendix.[1]

If this Court were to adopt petitioner's proposed rule — that a plaintiff who suffers no harm beyond the loss of his legal rights has no standing to sue — it could wreak havoc with the law of restitution and unjust enrichment, barring many long-established causes of action from federal courts. This important body of law long predates the American founding and serves essential functions, especially in private law but in parts of public law as well.

These amici take no position on the underlying statutory claim.

SUMMARY OF ARGUMENT

Petitioner's sweeping and ill-defined argument that no plaintiff can have standing without proof of

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[1] This brief was prepared entirely by amici and their counsel. No other person made any financial contribution to its preparation or submission. Consent letters are submitted with the brief.

The American Law Institute speaks only through its *Restatements* and similar projects. Each such project is repeatedly revised in light of detailed reviews by multiple groups of judges, practitioners, and academics. Each position taken is supported by cases cited in the reporter's notes. Finally, each project must be approved by the Institute's governing Council and separately by its membership. This brief did not go through these processes; it is not a statement of the American Law Institute.

"concrete harm" is aimed at claims for statutory minimum damages. The Court should reject this frontal assault on statutory remedies. But whatever the Court does with respect to statutory damages, it should take care not to inadvertently sweep away much of the law of restitution.

1. The law of restitution and unjust enrichment creates remedies and causes of action based on gain to defendant rather than loss to plaintiff. It follows that in appropriate cases, courts may impose liability for unjust enrichment even though the wrong that is the basis for plaintiff's claim caused no harm. It is enough that defendant's gain derived from a violation of plaintiff's rights. Moreover, plaintiffs to whom a fiduciary or confidential duty is owed can sue to set aside conflicted transactions without alleging or proving either damages to themselves or gain to defendant. Such remedies and causes of action have been part of Anglo-American law since before the American founding.

Only one person has standing to sue under the slayer rule, but that plaintiff need not even allege a violation of his own rights. There are also tort claims that are actionable without harm — trespass, trespass to chattels, assault, battery, and false imprisonment.

Even more at odds with petitioner's theory, private litigants at the founding could recover statutory damages or penalties in an action of debt, without proof of actual damages.

2. Standing necessarily depends on the relief sought. Plaintiffs may have standing to sue for damages but not standing to sue for an injunction, or vice

versa. *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983). And plaintiffs may have standing to sue for restitution of unjust enrichment without having standing to sue for damages or an injunction.

Standing to sue in unjust enrichment requires plaintiff to show that he is the source of defendant's enrichment, either in the sense that he suffered a loss that corresponds to defendant's gain, *or* in the sense that defendant's gain was acquired by violating plaintiff's rights. These rules are deeply embedded in the substantive law of restitution, and only occasionally are they labeled as standing rules. But they serve the function of standing rules: they confine the right to sue to identifiable individuals with a concrete stake in the litigation.

Congress cannot authorize individual plaintiffs to enforce generalized rights that belong to the whole public. But Congress can create new individualized rights, and it can enact effective remedies for those rights. Standing to sue for statutory minimum damages requires violation of an individualized statutory right personal to plaintiff. The "injury in fact" that is "the irreducible constitutional minimum of standing" is "invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Additional or consequential harms are not required.

3. Petitioner never specifies what it means by injury or harm. It acknowledges standing in many cases based only on violation of an individualized legal right, without proof of any further harm. It appears to say that standing on this basis is acceptable for common-law rights but not for statutory rights. Its

position reduces to little more than hostility to legislatures and to the statute it has allegedly violated.

ARGUMENT

I. Standing Often Does Not Require Plaintiffs to Establish Any Harm Beyond the Violation of Their Legal Rights.

As further explained in Part III, petitioner's understandings of "injury" and "harm" are undefined, shifting, and inconsistent. But the heart of petitioner's argument is that loss of respondent's statutory rights is not an injury that will support standing. Some *additional* or consequential harm is required. Pet. Br. 14-17.

Petitioner's approach cannot even explain the law of damages. It is utterly inconsistent with the law of restitution and unjust enrichment.

A. Restitution and Unjust Enrichment Is Based on Defendant's Gain, Not Plaintiff's Loss.

Compensatory damages, based on plaintiff's loss, and restitution of unjust enrichment, based on defendant's gain, are fundamentally distinct. *See, e.g.*, *Great-West Life & Annuity Insurance Co. v. Knudson*, 534 U.S. 204, 215 (2002) (contrasting restitution with damages). The remedies and the causes of action have different conceptual bases, different histories, and different measures of recovery.

These differences are long established and uncontroversial. As summarized in the standard treatises, "[R]estitution is measured by the defendant's gains, not by the plaintiff's losses." 1 Dan B. Dobbs, *Law of Remedies* §1.1 at 5 (2d ed. 1993). "[I]n the damage

action the plaintiff seeks to recover for the harm done to him, whereas in the restitution action he seeks to recover the gain acquired by the defendant through the wrongful act." 1 George E. Palmer, *The Law of Restitution* §2.1 at 51 (1978).

Often, an unjust gain to defendant will be matched by a corresponding loss to plaintiff. If $100 is misappropriated, or paid by mistake, defendant has gained $100 and plaintiff has lost $100. But sometimes, plaintiff's loss is smaller than defendant's gain. And sometimes, plaintiff has no economic loss at all. Such a plaintiff may still have a claim in restitution, because the basis of the claim is defendant's gain, not plaintiff's loss.

The new *Restatement* summarizes the basic principle as its predecessors summarized it: "A person who is unjustly enriched at the expense of another is subject to liability in restitution." *Restatement (Third) of Restitution and Unjust Enrichment* §1 (2011) (hereinafter *Restatement (Third)*).[2] It further explains in the first paragraph of the first Comment:

> While the paradigm case of unjust enrichment is one in which the benefit on one side of the transaction corresponds to an observable loss on the other, the consecrated formula "at the expense of another" can also mean "in violation of the other's legally protected rights," *without the need to show that the claimant has suffered a loss*. See §3.

Restatement (Third) §1 cmt. *a* (emphasis added).

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[2] *Accord, Restatement (Second) of Restitution* §1 (Tentative Draft No. 1, 1983); *Restatement of Restitution* §1 (1937).

Section 3, also closely tracking its predecessors, says simply that "A person is not permitted to profit by his own wrong." The first Comment makes two important points about this principle. First:

> The present section marks one of the cornerstones of the law of restitution and unjust enrichment. The general principle it identifies is the one underlying the "disgorgement" remedies in restitution, whereby a claimant potentially recovers more than a provable loss so that the defendant may be stripped of a wrongful gain.

Id. §3 cmt. *a*.

Second, the broad principle that no man may profit by his own wrong "identifies an outlook and an objective, not a cause of action." *Ibid.* "Working rules" that define specific causes of action come in later sections.

B. Many Familiar Causes of Action for Unjust Enrichment Do Not Require Plaintiffs to Establish Harm Beyond the Violation of Their Legal Rights.

Many familiar causes of action can support a restitutionary remedy in which plaintiff recovers defendant's unjust enrichment based on violation of a legally protected right, without the plaintiff having to establish any further harm. In some of these cases, it is clear that plaintiff suffered no harm beyond the loss of his rights. In others, plaintiff may or may not have suffered further harm, but he need not allege or prove any such harm.

A word about terminology: Some opinions rather clearly say that defendant's violation of plaintiff's

legal rights is an injury to plaintiff, even though plaintiff cannot establish any further harm. *See, e.g.*, *Olwell v. Nye & Nissen Co.*, 173 P.2d 652, 654 (Wash. 1946). These opinions define injury as violation of a right. In every case in which a person's legal right is violated, he has lost at least the entitlement created by that right.

Other opinions equate injury with further or consequential harm. These opinions rather clearly say that plaintiff can recover defendant's unjust enrichment without proof of any injury. *See, e.g.*, *Jackson v. Smith*, 254 U.S. 586, 589 (1921). The result is the same under either explanation: plaintiff can sue for defendant's unjust enrichment without establishing any harm beyond the violation of his legal rights.

1. Commercial Bribes and Kickbacks.

An employer can recover any bribe or kickback paid to his employee, without establishing that the quality of the employee's services or the terms of any transaction were actually affected. The rule is the same for a client who is entitled to honest and loyal services from a professional or a service provider. *Restatement (Third)* §43 illus. 17-19 & reporter's note *d*; *id.* §44 illus. 9 & reporter's note *b*; *Restatement (Third) of Agency* §8.02 and cmt. *b* (2006) ("it is not necessary that the principal show that the agent's acquisition of a material benefit harmed the principal.").

As the Minnesota court explained:

> It matters not that the principal has suffered no damage or even that the transaction has been profitable to him. ...
>
> "Actual injury is not the principle the law

> proceeds on, in holding such transactions void. Fidelity in the agent is what is aimed at, and, as a means of securing it, the law will not permit him to place himself in a position in which he may be tempted by his own private interests to disregard those of his principal."

Tarnowski v. Resop, 51 N.W.2d 801, 803 (Minn. 1952) (quoting *Lum v. McEwen* (*Lum v. Clark*), 57 N.W. 662, 662-63 (Minn. 1894)).

Governments are frequent plaintiffs in such cases. *See, e.g.*, *United States v. Carter*, 217 U.S. 286, 305-09 (1910); *United States v. Podell*, 572 F.2d 31, 34-35 (2d Cir. 1978).

2. Business Opportunities.

Another example, with ancient roots, is trustees or agents who take for themselves business opportunities that might have been of interest to their beneficiaries or principals.

This body of law appears to have been well established by the time of *Keech v. Sandford*, 25 Eng. Rep. 223 (Ch. 1726). A landlord refused to renew a lease to a trust for a minor; he then leased the property to the trustee individually. "[T]here was clear proof of the refusal to renew for the benefit of the infant," *id.* at 223, and the Chancellor did not doubt the fact. So the minor had not lost the lease due to any action by the trustee.

The minor had suffered no harm unless violation of his right to the trustee's undivided loyalty counts as harm. But the absence of harm could not change the result: "it is very proper that rule should be strictly pursued, and not in the least relaxed." *Ibid.*

From these beginnings, there has grown the whole modern law of corporate opportunities. Directors, officers, agents, partners, and the like cannot take for themselves a business opportunity that might have been of interest to their principal. Those who do are liable to the principal for all their profits from the opportunity. Plaintiff need not show that it would have invested in the opportunity itself, and therefore, it need not show that it was harmed. *Restatement (Third)* §43 illus. 14-15 and reporter's note *d*; *Restatement (Third) of Agency* §8.02 and cmt. *d* and reporter's note *d*; American Law Institute, *Principles of Corporate Governance* §5.05, §5.12, and reporter's notes (1992). For modern variations on *Keech*, see *Restatement (Third)* §43 illus. 1 and reporter's note *b*.

A famous illustration is Judge Cardozo's opinion in *Meinhard v. Salmon*, 164 N.E. 545 (N.Y. 1928). The opportunity there was to take a lease on a much larger tract, for a much longer term, requiring much more capital, than the original lease in the joint venture between the parties. *Id.* at 545-46. But it was not for defendant to decide whether his joint venturer would have been willing and able to participate. "No answer is it to say that the chance would have been of little value even if seasonably offered." *Id.* at 547. One who improperly takes a business opportunity for himself is liable for his profits. whether or not the victim was harmed.

3. Other Conflicts of Interest.

The rule that applies to bribes and kickbacks and to corporate opportunities applies with equal rigor to other transactions conducted under the potential influence of a conflict of interest. The principal or beneficiary in such a case can recover the unjust

enrichment of his agent or trustee without proof of harm. Or, because proof of defendant's gain is often difficult, he can sue to rescind or set aside the transaction without proving *either* harm to plaintiff or gain to defendant. *Restatement (Third) of Agency* §8.01 cmt. *d(1)* and reporter's note *d(1)* (summarizing both remedies).

Thus, it is a settled rule, again with ancient roots, that a receiver or trustee of the assets of an insolvent debtor cannot buy at his own sale, even if the sale is conducted at public auction and the trustee is the high bidder. *Restatement (Third)* §43 illus. 20 & reporter's note *d*; *Whelpdale v. Cookson*, 27 Eng. Rep. 856 (Ch. 1747).

A revealing example in this Court is *Jackson v. Smith*, 254 U.S. 586 (1921). The Court said that "it affirmatively appears that the sale was fairly conducted, that there was competitive bidding, and that the property was finally knocked down to the highest bidder." *Id.* at 587. But this high bidder was a group that included the trustee responsible for the sale, and the group went on to make profits with the property it had purchased. The Court unanimously held that the trustee and his confederates were liable "for all the profits obtained by him and those who were associated with him in the matter, *although the estate may not have been injured thereby.*" *Id.* at 589 (emphasis added).

Another striking example is *Mosser v. Darrow*, 341 U.S. 267 (1951). There, the employees of a reorganization trustee traded in the securities of the enterprise undergoing reorganization. The trustee who employed them and allowed them to trade was held personally liable for their profits, although he had not

traded for his own account and had no improper profits of his own. The trustee argued that his employees had caused no loss, and even that their purchases of securities had supported the price and been beneficial to the reorganizing enterprise. *Id.* at 272. The Court was not so sure of that, but its holding was that it did not matter. *Id.* at 273. The estate could recover the profits of a conflicted transaction, whether or not it had suffered any harm.

Another variation arises when an agent or trustee borrows assets of the principal or of the trust, and uses those assets to profit personally. The borrower is liable for his profits even if he repays the loan with interest and no harm is done. A clear example is *Slay v. Burnett Trust*, 187 S.W.2d 377 (Tex. 1945). The trustees borrowed money from the trust to invest personally in a speculative venture. They gave an interest-bearing note secured by oil and gas interests, *id.* at 385, and they had repaid most of the loan by the time of trial, *id.* at 387. Almost certainly the speculative investment would have been inappropriate for the trust. But the trustees were liable to the trust for their profits, because they had improperly used trust assets to make these profits. *Id.* at 387-89.

Similarly if a corporate officer uses any of the corporation's property for his own benefit, he is liable to the corporation for any resulting profit, whether or not the corporation is harmed. *Principles of Corporate Governance* §5.04(a), (c) and reporter's note *2*.

4. Misuse of Confidential Information.

A person who misuses confidential information is liable for any profits he makes as a result — whether or not the person entitled to control the information

can show harm. An example in this Court is *Snepp v. United States*, 444 U.S. 507 (1980), where a CIA agent published a book about his work without submitting the manuscript for review by the agency. The government made no effort to prove damages. The Court believed the government had been harmed but that any damages were "unquantifiable." *Id.* at 514. The Court granted a constructive trust over the profits from the book.

The rule is the same in more prosaic contexts such as trade secrets. One who misappropriates a trade secret is liable for his profits, whether or not plaintiff suffers any damages. Uniform Trade Secrets Act §3(a), 14 Unif. Laws Ann. 633 (2005).

Civil liability for insider trading depends on this principle. When the insider uses corporate information to profit by trading in the corporation's securities, the corporation can recover those profits without pleading or proving any harm. *Diamond v. Oreamuno*, 248 N.E.2d 910, 912 (N.Y. 1969); *Restatement (Third)* §43 illus. 9 and reporter's note *c*; *Principles of Corporate Governance* §5.04(a), (c). The cause of action is to recover defendant's profits, *see, e.g., SEC v. Warde*, 151 F.3d 42, 49-50 (2d Cir. 1998), and it is probably rare for the corporation to have any compensable loss.

5. Forfeiture of Fees.

An agent, attorney, or other person in a confidential relationship who breaches a duty of loyalty may forfeit fees to which he would otherwise be entitled. *Restatement (Third) of Agency* §8.01 cmt. *d(2)* and reporter's note *d(2)*; *Restatement (Third) of the Law Governing Lawyers* §37 and reporter's notes *a*, *e*

(2000). If the client has already paid those fees, he may sue to recover them. *Id.* cmt. *a*. The fiduciary would be unjustly enriched if he retained fees that he had forfeited by his disloyalty.

When the client sues to recover the fees, he need not show that the disloyal act caused harm. *See, e.g.*, *Burrow v. Arce*, 997 S.W.2d 229, 237-40 (Tex. 1999); *see id.* at 239 nn.36-37 (collecting authorities).

6. Infringement of Intellectual Property.

One who infringes a copyright, trademark, or trade secret is liable for either his own profits or the victim's losses. 17 U.S.C. §504(b) (copyright); 15 U.S.C. §1117(a) (trademark); Uniform Trade Secrets Act §3(a) (trade secret). Liability for profits has been repealed in patent infringement, 35 U.S.C. §284, except for design patents, §289, for policy reasons unrelated to standing.

If the infringer takes sales away from the victim of infringement, plaintiff will have losses and defendant will have gains that may be either more or less than plaintiff's damages. Plaintiff can generally sue for whichever is larger.

If the infringer expands the market, or creates a derivative work that is infringing but not duplicative, he may earn substantial profits without causing plaintiff to lose any sales. In such a case, plaintiff can recover defendant's profits without showing any harm. *Restatement (Third)* §42 illus. 7-9 and reporter's note *g*.

A copyright example is *Three Boys Music Corp. v. Bolton*, 212 F.3d 477 (9th Cir. 2000), where defendant produced a hit song in 1991 that infringed another hit from 1964. The infringer was liable for the portion of

his profits attributable to the infringement. But it is hard to imagine that plaintiff lost any sales of its 1964 song to a "similar" song in 1991.

A leading trademark example is *Maier Brewing Co. v. Fleischmann Distilling Corp.*, 390 F.2d 117 (9th Cir. 1968), where the sellers of an inexpensive beer copied the trademark of a well known scotch whisky. The infringers profited from their infringement, but plaintiff did not claim that it had lost any sales of whisky. Defendants plausibly argued that plaintiffs had shown "no injury to themselves, no diversion of sales from them to the appellants, no direct competition from which injury may be inferable." *Id.* at 120. Even so, defendants had to disgorge their profits.

The leading case in this Court is *Sheldon v. Metro-Goldwyn Pictures Corp.*, 309 U.S. 390 (1940), where MGM plagiarized the script of a play and made a major movie. Damages to the copyright holder might have been zero, and were at most quite modest compared to the profits from the movie. The Court affirmed plaintiff's judgment for 20% of the profits from the movie, based on the lower court's estimate of the highest proportion of the profits that might possibly have been attributable to the script. *Id.* at 408-09.

Recovery of the infringer's profits is sufficiently settled that although this Court decides many intellectual property cases, it has not returned to issues of how to measure the profits. *Sheldon* cites numerous earlier cases. *See also Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962, 1967 & n.1, 1973 (2014) (discussing the profits remedy in copyright); *Mishawaka Rubber & Woolen Manufac-*

turing Co. v. S.S. Kresge Co., 316 U.S. 203 (1942) (trademark).

7. Trespass.

A trespasser is liable for compensatory damages, for nominal damages in the absence of any actual damage, *infra* at 19, or for the profits of the trespass, *Restatement (Third)* §40 and reporter's note *c*.

There are well known examples where the trespass was harmless, because plaintiff was not using his property or could not use his property. But he could still recover the trespasser's profits. In *Raven Red Ash Coal Co. v. Ball*, 39 S.E.2d 231 (Va. 1946), defendant had an easement to build a railroad across plaintiff's land and to transport coal mined from specified tracts of land. Without authorization, defendant also transported coal from additional tracts. Defendant argued that the only remedy should be nominal damages for the tort. The court disagreed, awarding instead the value of the benefit wrongfully acquired:

> To limit plaintiff to the recovery of nominal damages for the repeated trespasses will enable defendant, as a trespasser, to obtain a more favorable position than a party contracting for the same right. Natural justice plainly requires the law to imply a promise to pay a fair value of the benefits received. Defendant's estate has been enhanced by just this much.

Id. at 238; *Restatement (Third)* §40 illus. 2.

Another well known example is *Edwards v. Lee's Administrator*, 96 S.W.2d 1028 (Ky. 1936); *Restatement (Third)* §40 illus. 4, §51 illus. 13. Edwards, who owned the mouth of the Great Onyx Cave, developed the cave as a tourist attraction. About one-third of the

cave was under Lee's land — 360 feet below the surface and inaccessible to Lee. 96 S.W.2d at 1030. The court did not find any damages; instead, it awarded one-third of the profits from the cave. "[W]e are led inevitably to the conclusion that the measure of recovery in this case must be the benefits, or net profits, received by the appellants from the use of the property of the appellees." *Id.* at 1032. Reviewing similar cases from various contexts, the court said: "The philosophy of all these decisions is that a wrongdoer shall not be permitted to make a profit from his own wrong." *Ibid.*

8. Conversion.

Similar facts can arise in conversion. *Restatement (Third)* §40 and reporter's note *d*. A well known example is *Olwell v. Nye & Nissen Co.*, 173 P.2d 652 (Wash. 1946). Defendant "borrowed" plaintiff's egg-washing machine, without authorization, and used it in his business for more than three years until discovered. Plaintiff had stored the machine in space adjacent to defendant's business, had no current use for it, and did not know it was missing. Defendant plausibly argued that plaintiff had suffered no loss.

The court said that the violation of plaintiff's rights was in itself an injury. *Id.* at 654. But the remedy it affirmed was restitution, not damages: the court awarded defendant's profits from using the machine. "To hold otherwise would be subversive of all property rights since his use was admittedly wrongful and without claim of right. The theory of unjust enrichment is applicable in such a case." *Ibid*; *Restatement (Third)* §40 illus. 17.

9. Rescission.

Rescission is another familiar restitutionary remedy that need not be accompanied by harm. If one party repudiates a contract, or substantially fails to perform, the other party is entitled to its money back, even if performance would have been worthless and contract damages would have been zero. *Mobil Oil Exploration & Producing Southeast, Inc. v. United States*, 530 U.S. 604 (2000); *Restatement (Third)* §37 illus. 1. After reviewing the underlying principles, 530 U.S. at 607-08, the Court in *Mobil* turned to the facts. The government convincingly argued that Mobil had suffered no harm, but the Court said that did not matter.

> This argument, however, misses the basic legal point. The oil companies do not seek damages for breach of contract. They seek restitution of their initial payments. Because the Government repudiated the lease contracts, the law entitles the companies to that restitution whether the contracts would, or would not, ultimately have produced a financial gain or led them to obtain a definite right to explore. If a lottery operator fails to deliver a purchased ticket, the purchaser can get his money back — whether or not he eventually would have won the lottery.

Id. at 623-24.

10. The Slayer Rule.

If a person who would inherit property on the death of another feloniously kills that other person, the slayer does not get to keep the property he inherits. *Restatement (Third)* §45. The rule is the

same if the slayer would acquire the property through life insurance, joint tenancy, or any other means by which property passes at death. *Ibid.*

The property passes instead to the person next in line, usually the person who would have inherited the property if the slayer had predeceased the victim. §45(3). That person had no legally protected interest at common law, and very often, he has no compensable injury and no legally protected interest under the wrongful death act. He may be an adult child of the victim, a sibling, a nephew, or a third cousin once removed. If he was not financially dependent on the victim, and not on the short list of other potential plaintiffs listed in the wrongful death acts of some states, he cannot sue for damages. But he can recover the slayer's unjust enrichment.

It is unimaginable that this body of law, partly judge-made and partly statutory, would be held unconstitutional. Yet the cause of action is vested in a substitute heir or beneficiary who often has suffered no legally cognizable harm. The purpose of the cause of action is to deprive the slayer of his unjust gains, the claim is vested in the most appropriate plaintiff, and that plaintiff has a concrete personal stake in the litigation. The slayer's enrichment is at plaintiff's expense only in the sense that this plaintiff will inherit if the slayer cannot.

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The point of all these examples is that plaintiffs who suffered no harm beyond the violation of their legal rights can often sue to recover or prevent defendant's unjust enrichment. Large, diverse, and important areas of law would be thrown into confusion

by an opinion suggesting that an unjust enrichment plaintiff must establish harm to have standing to sue in federal court.

C. Some Torts Are Actionable for Damages Without Evidence of Harm Beyond the Violation of Plaintiff's Rights.

As respondent explains, many common-law claims are actionable for damages without harm in petitioner's apparent sense of the word. Resp. Br. 16-22. We offer additional examples and authorities. "[A]ny intrusion upon land in the possession of another is an injury, and, if not privileged, gives rise to a cause of action even though the intrusion is beneficial, or so transitory that it constitutes no interference with or detriment to the land or its beneficial enjoyment." *Restatement (Second) of Torts* §7 cmt. *a* (1965); *see also id.* reporter's note *d*; *id.* §158, §163; 1 Dan B. Dobbs *et al.*, *The Law of Torts* §56 at 149 (2d ed. 2011).

Similarly, the action for trespass to chattels will lie for temporary dispossession "although there has been no impairment of the condition, quality, or value of the chattel, and no other harm to any interest of the possessor," and "he is not deprived of the use of the chattel for any substantial length of time." *Restatement (Second) of Torts* §218 cmt. *d*.

False imprisonment is actionable if the plaintiff *either* "is conscious of the confinement or is harmed by it." *Id.* §35(1)(c).

Assault is to intentionally cause apprehension of either "a harmful or offensive contact." *Id.* §21(a). Battery can be either "a harmful or offensive contact with the person." *Id.* §18(1)(a). And as Professor Dobbs reads the cases, "offensive" means no more

than without actual or apparent consent. Dobbs, *Torts* §33 at 81-82. The touching is offensive because defendant overrode plaintiff's objection.

In each of these intentional torts to the person, plaintiff may "recover substantial as distinct from nominal damages" without proof of either physical harm or emotional distress. "The invasion of the plaintiff's rights is regarded as a harm in itself and subject to an award of damages." *Id.* §47 at 120.

D. These Causes of Action Long Predate the American Founding.

Some of these claims, without harm in petitioner's sense, long predate the American founding. *Keech v. Sandford*, *supra* at 8, holding a trustee liable for taking an opportunity that the trust could not have taken in any event, was decided in 1726. And the Chancellor treated the rule as already settled.

Whelpdale v. Cookson, 27 Eng. Rep. 856 (Ch. 1747), where a trustee was the high bidder at his own public sale, set aside the sale without proof of either harm to plaintiff or profit to the trustee. The facts are more fully stated in *Whelpdale v. Cookson*, 28 Eng. Rep. 440 (Ch. 1747), where the reporter says that "This doctrine is not confined to Trustees, but extends to Assignees under Commissions of Bankrupt, Solicitors, Agents, and in short all persons having a confidential character," citing numerous cases. *Id.* at 441.

The reporter also notes that the authority of *Whelpdale* had "been doubted" by Lord Eldon in *Ex parte Lacey*, 31 Eng. Rep. 1228, 1229 (Ch. 1802). Lord Eldon's "doubt" was that *Whelpdale* had not gone far enough. *Whelpdale* said that a majority of the creditors could ratify a sale to a trustee who bought at his

own sale. But Lord Eldon insisted that only unanimous consent of all the creditors could ratify such a sale.

The Chancellors discussed these cases as a recurring problem. Those who had been deprived of their right to undivided loyalty could sue without more, because proof of actual injury or profit was too difficult. As Lord Eldon explained:

> [The rule] is founded upon this; that though you may see in a particular case, that he has not made advantage, it is utterly impossible to examine upon satisfactory evidence in the power of the Court, by which I mean, in the power of the parties, in ninety-nine cases out of an hundred, whether he has made advantage, or not.

Lacey, 31 Eng. Rep. at 1229.

So the courts dispensed with proof of loss to plaintiff; they dispensed even with proof of gain to defendant. It was enough to support a cause of action that defendant violated a duty of loyalty.

E. Founding-Era Plaintiffs Could Recover Statutory Damages or Penalties Without Evidence of Harm.

Even more fundamentally at odds with petitioner's theory, statutes often enacted civil penalties for various wrongs. Private plaintiffs could recover these penalties in an action of debt. *Tull v. United States*, 481 U.S. 412, 418 (1987); F.W. Maitland, *The Forms of Action at Common Law* 52 (1968 reprint) (debt "serves for the recovery of statutory penalties").[3] The

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[3] *Tull* cites *Calcraft v. Gibbs*, 101 Eng. Rep. 11 (K.B. 1792),

one "untranscendible limit" of an action of debt was that "the claim must be for a fixed sum." *Id.* at 51. Plaintiffs in such cases could recover only the fixed statutory sum; any actual damages were irrelevant.

The First Congress provided that copyright holders could recover, in an "action of debt," fifty cents for every infringing page found *in an infringer's possession*. An Act for the Encouragement of Learning §2, 1 Stat. 124, 124-25 (1790). So the remedy applied only to pages that had not been sold or distributed. Plaintiff could also recover and destroy these pages, *ibid*, so they never would be sold or distributed. So it is not just that no harm was required. Resp. Br. 22-23. These pages would never do harm, but plaintiff could recover the statutory sum in an action of debt.

Congress may have assumed that often there were other pages that had been sold, and that but for the lawsuit, some of the destroyed pages would have been sold. But Congress no doubt made similar assumptions about the harm of publishing false information about individuals. Both statutes may have presumed harm, but neither required evidence of harm.

F. Petitioner's Proposed Rule — Especially If Broadly Stated — Would Disrupt Large Bodies of Long-Established Law.

All these causes of action — for restitution without harm, for damages without harm, for statutory penalties without harm — were part of "the traditional concern of the courts at Westminster." Pet.

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and *Atcheson v. Everitt*, 98 Eng. Rep. 1142 (K.B. 1775); *see also* Theodore F.T. Plucknett, *A Concise History of the Common Law* 363 (5th ed. 1956) (debt lay "to enforce various statutory penalties"); *id.* at 633 (same).

Br. 18. They present traditional cases and controversies.

Petitioner rejects standing for any plaintiff who suffers no harm beyond the violation of his legal rights. This argument directly jeopardizes all statutes that provide minimum statutory recoveries. The danger to the law of restitution and unjust enrichment lies in the potential breadth of an opinion adopting petitioner's formulation of standing rules.

Broadly stating petitioner's rule would overturn centuries of Anglo-American law. All the cases discussed above would appear to be barred from federal court if this Court adopts petitioners' argument. Where a restitution plaintiff could establish harm, the claim could proceed — but requiring such proof in a claim for restitution of unjust enrichment would fundamentally change the lawsuit, adding a previously irrelevant issue to every plaintiff's burden of proof.

Many federal claims would be barred or fundamentally changed — claims to recover bribes paid to federal employees; claims for infringement of copyright, trademark, and design patents; claims to recover the profits of insider trading; claims to recover insiders' short-term profits; and more. Many state-law claims would be barred from the diversity jurisdiction.

Many states have similar standing rules for litigation in state court, often following or visibly influenced by this Court's decisions.[4] Defendants would argue the persuasive value of this Court's

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[4] A Westlaw search on September 4, 2015 revealed 749 state supreme court opinions discussing "standing" and "injury in fact" in the same paragraph.

decision in state court; every state would have to decide whether to preserve the traditional rules of restitution and unjust enrichment or to follow this Court's lead and bar many such claims. Of course this Court is not responsible for state law. But the Court should think carefully before it bars many state-law claims from federal court and throws large swathes of state law into potential chaos.

II. The Requirements of Standing Necessarily Depend on the Relief Plaintiff Seeks.

A plaintiff must show "that he has standing for each type of relief sought." *Summers v. Earth Island Institute*, 555 U.S. 488, 493 (2009) (citing *City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983)). This is because the relevant personal stake necessarily varies with the type of relief sought. There is no uniform rule of standing that applies without change to every type of relief.

A. Standing in Suits for Damages and Injunctions.

In *Lyons*, plaintiff suffered damages when a policeman choked him, so he had standing to sue for damages. But he was not sufficiently threatened with a repetition to have standing to sue for an injunction.

Many cases are the reverse. A plaintiff who is threatened with unlawful conduct has standing to sue for an injunction, but no standing to sue for damages, because his rights have yet not been violated. Threatened violation of a legal right is not injury in fact until or unless the right is actually violated. Plaintiffs in such cases have standing to sue for an injunction or declaratory judgment because they are threatened with injury that the court can prevent. *See, e.g., Med-*

Immune, Inc. v. Genentech, Inc., 549 U.S. 118 (2007).

B. Standing in Suits for Restitution and Unjust Enrichment.

Just as standing to sue for damages is different from standing to sue for an injunction, so standing to sue for restitution of unjust enrichment is different from either. Because claims for unjust enrichment are based on defendant's gains rather than plaintiff's losses, a focus on harm asks the wrong question. The basis for standing in claims for restitution of unjust enrichment is that defendant was enriched "at the expense of" plaintiff, either in the sense of a corresponding loss to plaintiff and gain to defendant, or in the sense that defendant's profits were derived from a violation of plaintiff's legally protected rights. *Supra* at 5.

This Court considered the standing question in *Gollust v. Mendell*, 501 U.S. 115 (1991). *Gollust* was a suit to recover a corporate insider's short-term trading profits under §16(b) of the Securities and Exchange Act, 15 U.S.C. §78p(b). The statute authorizes the issuer whose securities are illegally traded to recover these profits, and it authorizes holders of that issuer's securities to recover the profits on behalf of the issuer if the issuer fails to act.

It is unlikely that the issuer is harmed when one of its officers or major shareholders buys and sells in a six-month period, and even less likely that any individual security holder is harmed. Certainly no plaintiff is required to allege harm. The issuer has standing to sue because the statute creates the right; the statute creates the right because of the substantial risk that defendant misused the issuer's confi-

dential information to produce his profits. Shareholders have standing on the general principles of derivative suits.

Gollust held that a derivative plaintiff in a §16(b) suit must continue to hold his securities in the issuer throughout the litigation. Otherwise, he would not have the necessary "personal stake" in the lawsuit that is essential to Article III standing. 501 U.S. at 125-26. But this "personal stake" was not a matter of the derivative plaintiff establishing a likelihood, or even a possibility, that he was harmed. Plaintiff's "personal stake" was that "respondent still stands to profit, albeit indirectly, if this action is successful." *Id.* at 128. "[H]e retains a continuing financial interest in the outcome of the litigation derived from his stock in International's sole stockholder, Viacom, whose only asset is International." *Id.* at 127-28. The decision was unanimous.

To have standing to sue on a restitutionary claim for defendant's wrongful profits, plaintiff had to have a personal stake in recovering *defendant's profits* — not a personal stake in his own non-existent losses. Claims in restitution and unjust enrichment are based on defendant's gains, and standing depends on plaintiff's personal stake in those gains.

It does not follow that just anybody can create a personal stake by suing to recover a stranger's unjust enrichment. The requirement that defendant's gains be at plaintiff's expense is deeply embedded in the law of restitution. It appears in the black letter of §1 of the *Restatement (Third)*, and in the formulation of nearly every substantive rule of restitution and unjust enrichment. Even in the exceptional case of the slayer rule, courts carefully identify the appropriate plaintiff

entitled to inherit in lieu of the slayer — a choice that is easy in most cases but difficult in a few. *Restatement (Third)* §45(3) & cmt. *d*. Only that plaintiff can sue. Self-appointed plaintiffs without a personal stake cannot sue.

These rules requiring identification of the source of defendant's enrichment, or the appropriate heir in the slayer-rule cases, control who can be a plaintiff. Usually lawyers and judges think of these rules as simply part of the substantive law of restitution and unjust enrichment — just as in compensatory damages cases, they are more likely to think of the requirement that plaintiff suffer damages as part of his substantive claim than as a standing rule.

But when the wrong plaintiff tries to sue, or when an unusual plaintiff asserts that special circumstances give him the right to sue, then the court may talk about the identity of the restitution plaintiff in terms of standing. An example is *Fuchs v. Bidwill*, 359 N.E.2d 158 (Ill. 1976), where the court held that citizens and taxpayers lacked standing to sue on behalf of the state for restitution of corrupt profits allegedly earned by state legislators. *Id.* at 162. The state could have sued, but individual citizens and taxpayers could not.

Standing to sue depends on the "type of relief" sought. *Summers*, 555 U.S. at 493. The proper rule of standing in claims for restitution of unjust enrichment is that plaintiff have a personal stake in defendant's gains, and in all but the exceptional case of the slayer rule, that defendant's gains were acquired by violating plaintiff's legal rights.

C. Standing in Claims Specific to an Individual Plaintiff or General to the Whole Public.

Restitution claims without harm, and tort claims without harm, are examples of standing based on violation of an individual legal right that is specific, or "particularized," to the plaintiff. *Lujan*, 504 U.S. at 560. In such a case, there is individualized injury in the loss of plaintiff's individualized right.

The search for some injury or harm *beyond* the alleged violation developed in public-law cases where plaintiffs challenged government policies that did not actually apply to them. Thus in *Summers*, plaintiff sued to enjoin implementation of certain rules by which the Forest Service managed the national forests. In *Lujan*, plaintiffs challenged the government's failure to protect endangered species outside the United States. In *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000), the Court held that a private plaintiff's standing to recover damages suffered *by the government* depended on an implicit assignment from the government. But here too, plaintiff alleged only that a state agency had misreported labor costs to the federal government. *Id.* at 770. In these and many similar public-law cases, the challenged rule or practice did not regulate plaintiffs or interfere with any individualized right of plaintiffs. No right in any way personal or specific to plaintiffs had been violated. *See* Resp. Br. 35, 37.

Where the alleged violation is in no way personal to plaintiff, the Court's cases require plaintiff to show that the violation caused a further individualized injury that *is* personal to plaintiff. Otherwise, plaintiff

would have no more standing to sue than any other American, and the concern with courts exercising a general power to supervise the political branches would be at its maximum. Congress cannot by statute confer on individuals the right to assert generalized grievances or enforce public rights that belong to the people as a whole. *Lujan*, 504 U.S. at 573-74, 578. That is the principle on which petitioner relies. But this case does not fit within the principle.

What Congress *can* do is create new and individualized "legal rights, the invasion of which creates standing." *Warth v. Seldin*, 422 U.S. 490, 500 (1975). The "injury in fact" that is "the irreducible constitutional minimum of standing" is "*invasion of a legally protected interest* which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560 (emphasis added; quotation marks omitted); *see* Resp. Br. 25.

We know petitioner understands the significance of this definition — because they changed it in their opening quotation. Petitioner substituted "harm" for "invasion of a legally protected interest," placing "harm" just outside the quotation marks. Pet. Br. 2. But *Lujan* requires only "an invasion of a legally protected interest which is (a) concrete and particularized." 504 U.S. at 560. It does not require additional or consequential harm.

Respondent claims a particularized statutory right not to have false consumer-credit information published *about him*. The statute imposes liability for "willfully" failing to use "reasonable procedures to assure maximum possible accuracy of the information *concerning the individual* about whom the report relates." 15 U.S.C. §1681n(a), §1681e(b) (emphasis

added). This right is "concrete and particularized," and allegedly, it has been willfully violated. False consumer-credit information about respondent, published in violation of that right, is injury in fact. This Court's cases require no more. Petitioner cites no case in which the Court held that loss of such an individualized and personal right is insufficient to confer standing.

There is an unambiguous holding in *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), where a tester inquired about the availability of apartments in defendant's complex. As respondent explains, Resp. Br. 27-28, the decision rested squarely on the statutory violation. "A tester who has been the object of a misrepresentation made unlawful under § 804(d) has suffered injury in precisely the form the statute was intended to guard against, and therefore has standing ...." 455 U.S. at 373-74. The Court did not require some *additional* "concrete harm" to follow from loss of that statutory right. Plaintiff did not want an apartment and had no use for truthful information. Petitioner's claim that the case depends on some special rule about "discrimination" as inherently injurious, whether or not it has any further consequences, Pet. Br. 41, has no basis in the opinion. What the Court unanimously held is that loss of an individualized statutory right, without more, is injury in fact.

There is a less pointed illustration in *Clapper v. Amnesty International USA*, 133 S. Ct. 1138 (2013). Plaintiffs alleged that government surveillance of foreigners created a substantial risk that plaintiffs' international communications would be unconstitutionally intercepted. The Court held that this risk was too speculative to support standing. But the issue was

simply the certainty or substantiality of the threat that a communication would be intercepted. The Court did not suggest that an individual whose communications were sufficiently threatened with interception would also have to show that he would suffer some further harm *resulting from* that interception. The Fourth Amendment right to security in one's own communications is an individualized right, and violation of that right would be injury in fact.

Just as Congress can enact new individualized rights, so it can make those rights enforceable. Where compensatory damages are often small or hard to quantify, legislatures may authorize statutory minimum damages so that individuals will have a workable remedy when their rights are violated. Standing in such cases depends on a claim that plaintiff's individualized right was violated — that he lost that to which he was personally entitled under the statute — and that he satisfies any other prerequisites to the statutory remedy. The prerequisites to standing to seek this statutory remedy depend on the elements of the statutory claim, just as the prerequisites to standing to seek compensatory damages, injunctions, or restitution depend on the elements of those claims. What standing for all these remedies has in common is an actual or threatened "invasion of a legally protected interest which is ... concrete and particularized." *Lujan*, 504 U.S. at 560.

III. Petitioner Obfuscates What It Means by Injury and Harm.

Petitioner argues that plaintiffs who suffer no "concrete harm" have no standing to sue in federal court, even if their individual rights were violated. But petitioner never defines "harm." Petitioner obfus-

cates the meanings of "injury" and "harm" in unsuccessful efforts to hide the radical implications of its proposed rule and to distinguish the many cases that do not fit that rule.

Petitioner tries to explain away a few of the causes of action reviewed in part I of this brief. It ignores all the others. The heart of its argument is that loss of plaintiff's statutory right, without more, is not "concrete harm." Pet. Br. 14-17.

But then petitioner says that violation of rights under a contract, without more, *is* concrete harm. *Id.* at 26. Violation of rights under a trust, without more, *is* concrete harm. *Ibid.* Petitioner's apparent reason is that these rights were created by judges, not legislatures.

And then petitioner concedes that some *statutory* rights are also actionable without any harm beyond the violation of the right. Petitioner says that infringement of copyrights and patents, without more, is concrete harm, because those statutory rights built on older common-law rights. *Id.* at 46 n.9, 49. Petitioner appears to concede that plaintiffs under the Freedom of Information Act need show only that they "sought and were denied specific agency records" — not that failure to get the records would cause some further harm. *Id.* at 43 (quoting *Public Citizen v. United States Department of Justice*, 491 U.S. 440, 449 (1989)). That statutory right is said to build on mandamus. Pet. Br. 44.

But when Congress creates a new right not sufficiently "rooted in the common law," that is a mere "fiat." *Id.* at 16, 46 n.9, 49. Loss of that statutory right is not an injury; plaintiffs must show some further

harm, apparently some consequential damage from the loss of their statutory right.

Nothing underlies this distinction between common-law and statutory rights but hostility to Congress. Judges create real rights, loss of which is an injury, but the elected representatives of the people cannot create such rights. This distinction has no possible justification. "[T]here is absolutely no basis for making the Article III inquiry turn on the source of the asserted right." *Lujan*, 504 U.S. at 576.

Petitioner is forced to offer other ad hoc distinctions as well. It says that trespass to land is actionable without concrete harm because repeated trespasses might eventually create an easement. Pet. Br. 25-26. But plaintiff can recover for a single trespass; proof that defendant threatens to repeat the trespass is required only if plaintiff seeks an injunction. *See* Dobbs, *Torts*, §56 at 148-49. The prospect of continued controversy is sometimes what motivates plaintiff to sue, but continuing controversy has never been a prerequisite to the claim.

To explain damages for loss of the right to vote, petitioner implausibly claims that voting is a property right. Pet. Br. 25; *but see* Resp. Br. 18-19.

Petitioner misdescribes *Havens Realty*, emphasizing a harm the Court never mentioned to avoid recognizing the loss of the statutory right to truthful information that the Court relied on. *See supra* at 30.

Petitioner also misstates *Carey v. Piphus*, 435 U.S. 247 (1978), implying that standing to sue for nominal damages depended on plaintiffs' allegations that they lost "educational benefits" when they were suspended from school without due process. Pet. Br. 46 n.9. Not

so. If a hearing would have prevented plaintiffs' suspensions, they could have recovered actual "damages to compensate them for the injuries caused by the suspensions." 435 U.S. at 260. Nominal damages were authorized on the explicit assumption that there was no such loss. *Id.* at 266. "[T]he denial of procedural due process should be actionable for nominal damages without proof of actual injury." *Ibid.* Violation of plaintiffs' individualized right to due process — and nothing more — supported the claim.

To mask the radical implications of its proposed rule, petitioner finds harm in bare violations of law in various cases that it cannot distinguish — contract, trust, trespass, patent, copyright, discrimination, FOIA. Petitioner concedes that violation of these legal rights, without more, is concrete harm and injury in fact.

But petitioner cannot explain why violation of respondent's individualized right is not injury in just the same way. Respondent alleges that petitioner willfully failed to follow reasonable procedures to assure the accuracy of its information and that consequently, it published "information" that specifically, individually, and falsely described respondent. Congress created a statutory right that protects individuals from such false publications about them; violation of that right is an injury in fact. All that petitioner ultimately appears to say is that legislatively created rights are an inferior set of rights that do not count.

There is no difference in the magnitude of the interests at stake. An individual may well care more about Spokeo publishing false but arguably positive credit and employment information about him to the

whole world than he cares about a trespasser's harmless entry upon his land. An applicant can lose the job for being over-qualified; a suitor can lose a woman if she reads that he is married. When all the obfuscation and fallacious distinctions are stripped away, petitioner's argument boils down to hostility to Congress and to its view that the individual right Congress created is not worth protecting. This is an objection to the statutory remedy. It is not an argument about standing.

CONCLUSION

The judgment below should be affirmed. And the Court's opinion should take care to preserve the long-established law of restitution and unjust enrichment.

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APPENDIX

Identifying the Amici

The following individuals have joined as amici in this brief:

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REPLY BRIEF

Supreme Court, U.S.
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No. 13-1339

IN THE

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SPOKEO, INC.,
Petitioner,
v.
THOMAS ROBINS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR AMICUS CURIAE RETAIL LITIGATION CENTER, INC. SUPPORTING PETITIONER

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TABLE OF CONTENTS

Page

Table of Authorities ii

Interest of *Amicus Curiae* 1

Summary of Argument 2

Argument 4

The Ninth Circuit Erred By Reading The Act To Eliminate Article III's Injury-In-Fact Requirement 4

A. The doctrine of constitutional avoidance requires reversing the Ninth Circuit's broad construction of the Act 4

B. When Congress *does* wish to push the boundaries, the Court reasonably expects a clear statement to that effect 7

1. Clear-statement rules help courts in identifying legislative intent in delicate and important areas 8

2. Congress would not modify constitutional standing requirements without a clear statement 11

3. Congress is perfectly capable of speaking clearly about standing 13

C. Applying the clear-statement rule in this context has important practical benefits 14

CONCLUSION 18

TABLE OF AUTHORITIES

CASES Page

Allen v. *Wright*,
468 U.S. 737 (1984) 6

Ashwander v. *Tennessee Valley Authority*,
297 U.S. 288 (1936) 5, 6

Atascadero State Hospital v. *Scanlon*,
473 U.S. 234 (1985) 10

Bond v. *United States*,
134 S. Ct. 2077 (2014) 6, 7, 8

Boumediene v. *Bush*,
553 U.S. 723 (2008) 6, 9, 10

Burnside v. *Michaels Stores Inc.*,
No. 6:15-cv-3010 (W.D. Mo.) 17

Castro v. *Michaels Stores Inc.*,
No. 3:15-cv-276 (N.D. Tex.) 17

EEOC v. *Arabian American Oil Co.*,
499 U.S. 244 (1991) 7

Fernandez v. *Home Depot USA Inc.*,
No. 8:13-cv-00648 (C.D. Cal.) 17

Graham v. *Michaels Stores Inc.*,
No. 2:14-cv-07563 (D.N.J.) 17

Gregory v. *Ashcroft*,
501 U.S. 452 (1991) 9

Hamdan v. *Rumsfeld*,
548 U.S. 557 (2006) 9

Hecht Co. v. *Bowles*,
321 U.S. 321 (1944) 10, 12

INS v. *St. Cyr*,
533 U.S. 289 (2001) 8, 9

Knights v. *Publix Super Markets, Inc.*,
No. 3:14-cv-00720 (M.D. Tenn.) 17

Lujan v. *Defenders of Wildlife*,
504 U.S. 555 (1992) 11, 12

McClure v. *Carter*,
513 F. Supp. 265 (D. Idaho), *aff'd sub nomine*
McClure v. *Reagan*, 454 U.S. 1025 (1981) 14

Morrison v. *National Australia Bank, Ltd*,
561 U.S. 247 (2010) 9

Owen Equipment & Erection Co. v. *Kroger*,
437 U.S. 365 (1978) 12

Schiavo ex rel. Schinder v. *Schiavo*,
403 F.3d 1289 (11th Cir. 2005) 13

Schiavo ex rel. Schindler v. *Schiavo*,
403 F.3d 1223 (11th Cir. 2005) 13

Speer v. *Whole Foods Market Group Inc.*,
No. 8:14-cv-03035 (M.D. Fla.) 17

Sykes v. *United States*,
131 S. Ct. 2267 (2011) 16

United States v. *Bass*,
404 U.S. 336 (1971) 8

United States v. *Lopez*,
514 U.S. 549 (1995) 5

Valley Forge Christian College v. *Americans United for Separation of Church and State, Inc.*,
454 U.S. 464 (1982) 12

Vermont Agency of Natural Resources v. *United States ex. rel. Stevens*,
529 U.S. 765 (2000) 12

Walker v. *Dollar Tree Stores Inc.*,
No. 8:15-cv-01170 (M.D. Fla.) 17

Yellow Freight System, Inc. v. *Donnelly*,
494 U.S. 820 (1990) 10

CONSTITUTIONAL PROVISIONS

U.S. Const. art. I, § 6, cl. 2 14

U.S. Const. art. II, § 3 12

U.S. Const. art. III ..... *passim*

STATUTES

15 U.S.C. § 1681b(b)(2)(A)(i) 16

Act of October 12, 1979,
Pub. L. No. 96-86, 93 Stat. 656 14

Fair Credit Reporting Act,
15 U.S.C. § 1681 *et seq.* ..... *passim*

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Pub. L. 109-3, 119 Stat. 15 (Mar. 21, 2005) 13

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Over Job Credit Checks, Law360 (Apr. 9, 2015)..... 17

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Background Checks, Law360 (May 18, 2015) 17

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Class Action, Law360 (Apr. 21, 2015)..... 17

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Background Checks, Law360 (Oct. 28, 2014) 17

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Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR AMICUS CURIAE RETAIL LITIGATION CENTER, INC. SUPPORTING PETITIONER

INTEREST OF *AMICUS CURIAE*

The Retail Litigation Center, Inc. (RLC) is a public-policy organization that identifies and engages in legal proceedings that affect the retail industry.[1] The RLC's members include many of the country's largest and most innovative retailers. The member entities whose interests the RLC represents employ millions of people throughout the United States, provide goods and services

[1] Pursuant to this Court's Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part, that no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than *amicus* and its counsel made such a monetary contribution. Letters from counsel of record for each party consenting to the filing of this *amicus* brief are on file with the clerk's office.

to tens of millions more, and account for tens of billions of dollars in annual sales. The RLC seeks to provide courts with retail-industry perspectives on important legal issues, and to highlight the potential industry-wide consequences of significant pending cases.

SUMMARY OF ARGUMENT

The Ninth Circuit gave the Fair Credit Reporting Act (the "Act") an expansive reading—so expansive that it effectively erased injury-in-fact as a constitutional requirement for standing. Although this Court could reverse the judgment below because it contravenes Article III, another option is also available: rejecting the Ninth Circuit's construction of the Act. Reversing on that ground would terminate this litigation and reserve for another day the exploration of the outer boundaries of Article III standing.

The Ninth Circuit construed the Act to authorize suit and recovery by plaintiffs who, while unharmed themselves, could point to a defendant's violation of technical statutory standards. This aggressive construction implicates Article III's limits. A closer statutory reading, however, reveals no such constitutionally dubious legislative ambition, but only the standard fare of a regulatory statute—authorizing suits by those who have actually been injured by a statutory violation. Under that reading, Congress never intended the Act to push up against Article III, thus leaving no constitutional tension to resolve. If Congress ever *does* seek to press standing beyond the breaking point, this Court will have ample opportunity to consider how far Congress can go.

This more modest reading—that the Act allows individuals to sue and recover *when they are harmed* by a violation—follows from the Court's traditional background presumption that Congress does not intend to violate the Constitution, or even approach its outer limits.

Congress can always rebut such a presumption simply by providing a clear statement—that, for example, it *does* wish to eliminate the injury-in-fact component of standing, at which point the courts must confront the resulting constitutional question. Hesitating to decide constitutional issues when they are not squarely presented respects Congress by assuming that Congress would push past time-honored constitutional understandings only consciously and after meaningful deliberation, not capriciously or casually. By trusting Congress to make clear when it wishes to deviate from established constitutional norms, the Court avoids the twin dangers of invalidating statutes on the basis of constitutional conflict that Congress never intended and of endorsing novel constitutional propositions that Congress never actually enacted.

Under these principles, the Court should reject the Ninth Circuit's reading. After all, the Act here contains no express language clearly eliminating the injury-in-fact requirement of standing, and its text bears the more modest and constitutionally unassailable interpretation that private litigation is contingent, as always, on alleging an actual injury.

Applying this Court's clear-statement principles to statutes touching on the Constitution's standing requirements also has important practical benefits. Statutes like the Act have proliferated, and the regulated public—like retailers—are subject to constantly increasing requirements from all levels of government. Clarity about the obligations and potential liabilities actually imposed on businesses and citizens acting in commercial capacities would give them the notice that they need to comply with legal obligations as efficiently as possible. Congress is far more likely to view its legislation as facilitating good-faith compliance than as inviting litigation by ambush, with plaintiffs awaiting the slightest technical error, even when no harm results, as a basis to bring suit.

If Congress ever actually intended the latter result, the Court should reasonably expect it to say so clearly.

The need for a uniform and sensible approach to construing statutes like the Act is urgent. Like those of other industries, members of the retail industry are repeatedly sued for technical, no-harm violations of this Act and others like it. The Court should recognize the enormous practical consequences that would follow from greenlighting the Ninth Circuit's willingness to open the gates to federal court without a plaintiff who has suffered an actual injury.

ARGUMENT

THE NINTH CIRCUIT ERRED BY READING THE ACT TO ELIMINATE ARTICLE III'S INJURY-IN-FACT REQUIREMENT

Before considering whether Congress constitutionally *could* enact a statute like the one portrayed by the Ninth Circuit—although *amicus* agrees with Spokeo that it could not—the Court may choose instead to consider whether Congress in fact *did* enact such a statute. If, as *amicus* argues, Congress never intended the Fair Credit Reporting Act to authorize cases like Robins's, then this opening inquiry should also be the closing one. The absence of any clear textual indication that Congress wished to push standing up to or beyond Article III's limits is dispositive.

A. The doctrine of constitutional avoidance requires reversing the Ninth Circuit's broad construction of the Act

In construing the Act, the Ninth Circuit embraced the most constitutionally problematic reading that the Act could possibly bear, casually dismissing other alternatives as "of little consequence," given its confidence in its own construction. Pet. App. 7a n.2. This was error. When the Ninth Circuit concluded that "the statutory

cause of action does not require a showing of actual harm," *id.* at 6a, the court should have heard constitutional alarm bells ringing. Unlike an element of a claim that Congress could include or dispense with as seems best, "actual harm" is not something that is merely an option for Congress to consider; instead, as Spokeo has explained, actual harm is a fundamental *constitutional* prerequisite for access to the federal courts. See Pet. Br. 11-32. The Ninth Circuit should have selected the reading of the statute that did not trigger such constitutional problems.

No one disputes Congress's broad power and responsibility to legislate, particularly in the sphere of interstate commerce. The Commerce Clause vests Congress with ample power to enact legislation to regulate any "economic activity [that] substantially affects interstate commerce." *United States* v. *Lopez*, 514 U.S. 549, 560 (1995). Congress correspondingly enjoys substantial discretion and deference to its judgment that a chosen regulatory scheme—including creating new rights and obligations—is necessary to protect the Nation's commercial interests. The very breadth of this power, however, generates the need for cautious statutory constructions. If courts always gave statutory text its broadest possible meaning, statutes passed under capacious provisions like the Commerce Clause would regularly threaten the outer bounds of the Constitution—but only rarely with that intention.

Weighing a statutory provision's constitutionality is appropriate only when it is certain that Congress truly intended its legislation to bear the constitutionally questionable meaning. This Court refuses to proceed to constitutional analysis if there are alternative routes to resolution open. See, *e.g.*, *Ashwander* v. *Tenn. Valley Auth.*, 297 U.S. 288, 346-347 (1936) (Brandeis, J., concurring). Likewise, the Court avoids constitutional tension by

adopting a plausible reading that does not present serious constitutional questions. *Id.* at 348.

Thus, last year, for example, the Court refused to read the Chemical Weapons Convention Implementation Act to reach ordinary and wholly intra-state assault cases. Such a reading, it concluded, would subject that statute to constitutional problems arising from federalizing purely intra-state conduct. Because a plausible alternative was available, the Court read the statute more narrowly, thereby avoiding a more aggressive construction that would trigger constitutional scrutiny and the risk of judicially invalidating the statute. See *Bond* v. *United States*, 134 S. Ct. 2077, 2088-2090 (2014).[2]

Spokeo's brief more than adequately demonstrates that the constitutional question in this case is serious—and indeed that, if that question must be reached, the judgment below should be reversed on that ground, requiring the invalidation of the Act's expansion of standing. See Spokeo Br. 36-53. After all, standing is not simply a doctrine to be learned or a jurisdictional matter to be established. It is a constitutional principle that demarcates the Judiciary's sphere of authority. It preserves the separation of powers, and therefore, ultimately, liberty. It is "[t]he idea of separation of powers that underlies standing doctrine," *Allen* v. *Wright*, 468 U.S. 737, 759 (1984), and "the Constitution's separation-of-powers structure, like the substantive guarantees of the Fifth and Fourteenth Amendments, protects" individual rights. *Boumediene* v. *Bush*, 553 U.S. 723, 743 (2008) (ci-

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[2] That risk was not insubstantial. Three concurring Justices, who felt compelled to reach the constitutional question, would have found the statute unconstitutional. See, *e.g.*, *Bond*, 134 S. Ct. at 2098-2102 (Scalia, J., concurring in the judgment); *id.* at 2102-2103 (Thomas, J., concurring in the judgment); *id.* at 2111 (Alito, J., concurring in the judgment).

tations omitted).

But that constitutional analysis can be pretermitted because the Act has a constitutionally unremarkable text and structure—it provides technical standards that "consumer reporting agencies" must follow, and provides a right of action for those *who have constitutional standing*—*i.e.*, those who have been actually harmed by violations of the technical standards. The doctrine of constitutional avoidance is sufficient to resolve this case.

B. When Congress *does* wish to push the boundaries, the Court reasonably expects a clear statement to that effect

Even if it were established that Congress *could* make adjustments to the actual-injury requirement of standing, that does not establish that Congress intended to do so here. The Act should reasonably be interpreted to avoid a construction that touches on important constitutional values—here, the very character of Article III's standing requirements and the deleterious consequences of transferring to private parties the power to prosecute alleged violations of legal standards when the parties have not themselves been actually harmed by those violations. This is not simply a matter of dodging a clear congressional intent to adopt a constitutionally questionable statute. Rather, as the Court explained in *Bond*, "[p]art of a fair reading of statutory text is recognizing that 'Congress legislates against the backdrop' of certain unexpressed presumptions." 134 S. Ct. at 2088 (quoting *EEOC* v. *Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991)). A clear statement to the contrary, of course, can rebut any such presumption. But absent such a clear indication that Congress actually wished to expand standing dramatically—and none exists in this Act—the Court should presume that Congress intends no such fundamental alteration of the lines of demarcation among the three branches even assuming that it had the power to do so.

1. *Clear-statement rules help courts in identifying legislative intent in delicate and important areas*

Bond itself provides a useful example. While the statutory text at issue there was extraordinarily broad and unquestionably *could* have been construed to cover the intra-state conduct involved in that case, the Court made clear that part of the judicial reading of statutory text requires identifying the shared understandings between Congress and the courts that facilitate the smooth application of statutes. "The problem with [the Government's] interpretation is that it would 'dramatically intrude[] upon traditional state criminal jurisdiction,' and we avoid reading statutes to have such reach in the absence of a clear indication that they do. * * * As we have explained, 'Congress has traditionally been reluctant to define as a federal crime conduct readily denounced as criminal by the States.' There is no clear indication of a contrary approach here." 134 S. Ct at 2088, 2093 (quoting *United States* v. *Bass*, 404 U.S. 336, 350, 349 (1971)).

In other words, while the statute *could* be read to cover the conduct at issue, the Court repeatedly insisted on a "clear indication" that Congress *actually intended* that it cover such conduct before it would give it the more aggressive reading. This need not imply anything at all about Congress's *power* to make any particular choice. Indeed, this Court requires explicit language from Congress in areas in which Congress has particularly broad power to legislate. "'[T]he Court . . has tended to create the strongest clear statement rules to confine Congress's power in areas in which Congress has the constitutional power to do virtually anything.'" *INS* v. *St. Cyr*, 533 U.S. 289, 299 n.10 (2001) (quoting Eskridge & Frickey, Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking, 45 Vand. L. Rev. 593, 597 (1992)).

Clarity is vital when political will is the primary pro-

tection against "intrusive exercises of Congress' Commerce Clause powers * * *." *Gregory* v. *Ashcroft*, 501 U.S. 452, 464 (1991). The Court must "be absolutely certain Congress *intended* such an exercise." *Ibid.* (emphasis added). Because "the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch," *id.* at 458, Congress must textually remove all doubt if it intends to intrude upon the powers of coordinate branches. Creating new rights and remedies under the Commerce Clause is, as a general matter, purely for Congress; if its powers extend to modifying the roles of the other branches, therefore, then a respectful response from the Judiciary is to attribute no such motive to Congress unless it is unmistakable.

Examples in various other contexts abound. Some derive from constitutional red lines and others from centuries of tradition that Congress would be unlikely to jettison without doing so clearly.

- The Court has emphasized that limitations on access to habeas corpus present such a serious Suspension Clause issue that a statute will not be read to require that result if any other plausible reading exists. See *St. Cyr*, 533 U.S. at 300 (no clear statement to rebut presumption); *Boumediene*, 553 U.S. at 737-738 (Congress sufficiently rebutted presumption with clear statement); cf. *Hamdan* v. *Rumsfeld*, 548 U.S. 557, 575 (2006) ("Congress [will] not be presumed to have affected such denial [of habeas corpus] absent an unmistakably clear statement to the contrary.").
- In *Morrison* v. *National Australia Bank, Ltd.*, the Court emphasized that "[w]hen a statute gives no clear indication of an extraterritorial application, it has none." 561 U.S. 247, 255 (2010).

- The Court has held that "Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute." *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 242 (1985).
- Giving "exclusive jurisdiction over a federal cause of action" requires Congress to "affirmatively divest state courts of their presumptively concurrent jurisdiction." *Yellow Freight Sys., Inc.* v. *Donnelly*, 494 U.S. 820, 823 (1990).
- In *Hecht Co.* v. *Bowles*, the Court even presumed that Congress would make no "abrupt departure from traditional equity practice" without first "ma[king] its desire plain." 321 U.S. 321, 330 (1944).

All of these (and other) presumptions ultimately turn on common sense and the respectful assumption that Congress desires to maintain the contours of our constitutional system. One would not, in other words, expect Congress to cavalierly or thoughtlessly abrogate the States' sovereign immunity, and so it is sensible to read a statute as intending such a step (when constitutionally permissible at all) only when Congress has removed all ambiguity. "This interpretive rule facilitates a dialogue between Congress and the Court. If the Court invokes a clear statement rule to advise that certain statutory interpretations are favored in order to avoid constitutional difficulties, Congress can make an informed legislative choice either to amend the statute or to retain its existing text." *Boumediene*, 553 U.S. at 738 (citations omitted).

2. *Congress would not modify constitutional standing requirements without a clear statement*

Legislative adjustments to standing to sue readily fit within the category where this Court expects clear indications from Congress before the Court will read a statute to take a dramatic turn from established constitutional understandings. When exercising its power to authorize private litigation, for instance, "Congress must at the very least identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit." *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 580 (1992) (Kennedy, J., concurring). If it is indispensable to clearly "identify the injury" underlying a new cause of action, the Court should expect far more clarity in a statute that intends to *eliminate* the injury-in-fact requirement altogether.

The Ninth Circuit's expansive reading of the Fair Credit Reporting Act, however, leaps to the conclusion that Congress intended plaintiffs to be excused from showing injury in fact. Pet. App. 6a. Spokeo is a business that aggregates publicly available data to operate a "people search engine." Here, Spokeo allegedly included false data that *enhanced* Robins's qualifications. Whether Spokeo violated the Act's standards at all is not directly at issue here, but even assuming that it did, lawsuits like Robins's—seeking redress for an act causing him no concrete injury—upset the balance of power in two ways that justify demanding a clear statement before embracing the Ninth Circuit's reading: They directly infringe upon the Executive's law-enforcement responsibility and they drag the Judiciary into disputes that do not fall within the "judicial Power," U.S. Const. art. III, § 1.

First, the injury-in-fact requirement is "not just an empty formality." *Lujan*, 504 U.S. at 581 (Kennedy, J., concurring). It protects "the Chief Executive's most im-

portant constitutional duty, to 'take Care that the Laws be faithfully executed,' Art. II, § 3." *Id.* at 577 (maj. op.). A private party does not have "special license to roam the country" to search out wrongdoings and bring them to court. *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 487 (1982). Unless Congress expressly grants a private party the right to bring suit, see *Vermont Agency of Nat. Res.* v. *United States ex. rel. Stevens*, 529 U.S. 765, 773 (2000), enforcement of the laws belongs to the President, not bounty hunters. See also Pet. Br. 28-31.

Second, another primary purpose of the concrete-injury requirement is to "confine[] the Judicial Branch to its proper, limited role in the constitutional framework of Government." *Lujan*, 504 U.S. at 581 (Kennedy, J., concurring). Any limitation upon the federal Judiciary, "whether imposed by the Constitution or by Congress, must be neither disregarded nor evaded." *Owen Equipment & Erection Co.* v. *Kroger*, 437 U.S. 365, 374 (1978). If Congress desired to make an abrupt departure from Article III standing requirements in the adoption of the Act, "it would have made its desire plain." *Hecht Co.*, 321 U.S. at 330. Reading the Act, as the Ninth Circuit did, to eliminate the need to show any injury-in-fact thus undercuts the constitutional structure of the separation of powers—*all three powers*—without any clear statement from Congress that it intended to do so.

The Ninth Circuit insisted on no such clarity, believing that Congress's simple authorization of statutory damages dispensed with the injury-in-fact requirement. Pet. App. 6a. But that hardly makes sense. It is at odds with what the Act intends to do—prevent *harm* and compensate *injury*. Indeed, drawing such broad meaning from the mere existence of statutory damages exacerbates the problem—granting standing to someone not *constitutionally entitled* to sue is bad enough, but then entitling

such a party to collect potentially ruinous damages *for nothing* of constitutional cognizance is dramatically worse.[3] A statute requiring "accurate payment of overtime," with a statutory penalty for willful violations, would not reasonably indicate a congressional desire to subject a company to suit and damages after inaccurately *over-paying* employees.

3. *Congress is perfectly capable of speaking clearly about standing*

Nor is there any question that Congress is capable of legislating expressly—as it has done when it wishes to push standing to (and perhaps beyond) its outer bounds. It did so in the well known case of Terri Schiavo. See Relief of the Parents of Theresa Marie Schiavo, Pub. L. 109-3, § 2, 119 Stat. 15, 15 (Mar. 21, 2005) ("Any parent of Theresa Marie Schiavo shall have standing to bring suit under this Act.").[4] In 1979, after the Senate confirmed Congressman Abner Mikva to a seat on the United State Court of Appeals for the District of Columbia Circuit, Congress passed a special statute allowing members of Congress to challenge the appointment on the grounds

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[3] The collapse of the three-part standing inquiry into simply the question of whether there has been a statutory violation, see Pet. App. 9a, shows how dramatic the Ninth Circuit's judgment actually is. Spokeo's constitutional analysis is surely correct—but more immediately, the very fact that the Ninth Circuit collapses well-understood standing requirements into the mere existence of a statutory cause of action is itself a reason to doubt that Congress intended such a result. Even if Congress thought that it *could* escape Article III, it would be unlikely to do so in such a cavalier manner.

[4] The case was ultimately resolved when the courts refused to read the statute as requiring a preliminary injunction, see *Schiavo ex rel. Schindler* v. *Schiavo*, 403 F.3d 1223 (11th Cir. 2005); *Schiavo ex rel. Schinder* v. *Schiavo*, 403 F.3d 1289 (11th Cir. 2005), and this Court denied certiorari.

that it violated the Constitution's Ineligibility Clause,[5] because "the salaries of federal judges were increased during [then-Congressman] Mikva's term in Congress * * *." *McClure* v. *Carter*, 513 F. Supp. 265, 266 (D. Idaho), *aff'd sub nomine McClure* v. *Reagan*, 454 U.S. 1025 (1981). The statute,[6] which the courts voided for violating the standing doctrine, "purport[ed] to grant standing to senators who voted for Judge Mikva as well as to those who voted against him. Furthermore, the statute purports to grant standing to members of the House of Representatives, who had no vote on the appointment at all." *Id.* at 271. That Congress readily can express its will when it wishes to push the standing envelope makes it far less likely that, in the Act at issue here, it intended to press as far as the Ninth Circuit believed.

The bottom line here is that the Ninth Circuit's analysis was backward in its assumptions. Rather than assume that Congress intended to erase standing requirements because "the statutory cause of action does not require a showing of actual harm," Pet. App. 6a, the logic of this Court's cases requires that Congress expressly provide for standing in the absence of harm if that is what it intends.

C. Applying the clear-statement rule in this context has important practical benefits

The doctrinal analysis of this case cannot be wholly divorced from its larger context: the Act is a regulatory statute that imposes technical standards on American

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[5] "No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time * * *." U.S. Const. art. I, § 6, cl. 2.

[6] Act of October 12, 1979, Pub. L. No. 96-86, § 101(c), 93 Stat. 656 (not codified)

businesses. The Fair Credit Reporting Act details standards for how consumer credit reports must be processed, prepared, divulged, and reviewed. But that is, of course, only a tiny fraction of the regulatory thicket facing all American businesses.

From the perspective of this regulated public, clarity is not so much a doctrinal nicety as an essential means of being able to comply with the law in good faith. For example, if this Act—and the many others like it—contained a clear statement subjecting businesses to private suits *even when no one has been harmed*, businesses would at least have meaningful notice of this vast risk. The clear statement would itself generate awareness of potential liability, which in turn could inform decision-making about whether and to what extent businesses or individuals should engage in particular commercial endeavors. Sometimes the risk may not be worth the reward; ensuring absolute compliance could be so costly as to destroy an activity's economic value altogether. But clear statutory directives at least would allow businesses to make an educated assessment in the first place.

Clarity also facilitates compliance. Commercial actors work hard to comply with all obligations, but there are countless opportunities for the unwary to fall short of some technical requirement or other. Before any retailer can buy any inventory, sell any merchandise, or employ any workers, it faces a complex of governmental imperatives—statutes passed at the federal, state, and local levels, and then regulations issued by administrative agencies at each level of government. That corpus is always growing. Each year, between 2,500 and 4,500 new final rules—of sometimes considerable length and complexity—are published in the Federal Register alone. See Carey, Counting Regulations: An Overview of Rulemaking, Types of Federal Regulations, and Pages in the Federal Register, Congressional Research Service, at ii

(2014).[7] Those who are trying in earnest to follow the law often find it difficult to know what the law demands—and error can be financially ruinous or even bring criminal consequences.[8]

Retailers, like those in other industries that contribute to the American economy, certainly seek no dispensation from any validly imposed legal obligation. But a clear-statement rule with respect to statutes, like the Act, that vastly expand the number of potential plaintiffs, would allow the regulated public to predict with some modicum of accuracy what the law requires. This is not a theoretical concern. As Spokeo noted, various *amici* at the petition stage have already illustrated with examples how no-harm lawsuits (and often class actions) under the Act, or others like it, have begun to proliferate. See Pet. Br. 33. The retail industry is, unsurprisingly, no exception.

To take but a single type of claim under just the Fair Credit Reporting Act itself, retailers are frequently targeted in no-harm class-action lawsuits for alleged violations of the Act's requirement that companies include a "stand-alone disclosure" during the job-application process. See 15 U.S.C. §1681b(b)(2)(A)(i). Retailers who have included any *extra* information on a disclosure have been sued; many such cases will turn on this Court's decision in *Spokeo*, while others have already led to substantial nuisance-value settlements that primarily pay

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[7] Available at https://fas.org/sgp/crs/misc/R43056.pdf.

[8] In *Sykes* v. *United States*, Justice Scalia acknowledged the "ever-increasing volume of laws in general, and of criminal laws in particular. It should be no surprise that as the volume increases, so do the number of imprecise laws. And no surprise that our indulgence of imprecisions that violate the Constitution encourages imprecisions that violate the Constitution." 131 S. Ct. 2267, 2288 (2011) (Scalia, J., dissenting).

the lawyers.[9] These cases, already just the tip of the iceberg and taken only from this single Act, would presumably be just the start of a much larger onslaught if the judgment below were to be affirmed and this litigation tactic were to be endorsed.

But common sense reveals that there is no good reason that Congress would intend to draft statutes to function like jackpots for the primary benefit of those who scour the United States Code or the Code of Federal Regulations to identify technical misses that harmed nobody. Robins here purports to be able to extract more than a *billion* dollars from Spokeo, simply because of alleged errors that have harmed neither himself nor anyone else. See Pet. Br. 33-34. It is unlikely in the extreme that Congress thought that it was endorsing such entrepreneurial yet destructive litigation.

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[9] See, *e.g.*, Bricketto, JPML Centralizes Michaels Class Suits Over Job Credit Checks, Law360 (Apr. 9, 2015), available at http://www.law360.com/articles/641381 (discussing *Graham* v. *Michaels Stores Inc.*, No. 2:14-cv-07563 (D.N.J.); *Burnside* v. *Michaels Stores Inc.*, No. 6:15-cv-3010 (W.D. Mo.), and *Castro* v. *Michaels Stores Inc.*, No. 3:15-cv-276 (N.D. Tex.)); Field, Whole Foods Can't Stay FCRA Suit Until *Spokeo* Decision, Law360 (Apr. 29, 2015), available at http://www.law360.com/articles/649165 (discussing *Speer* v. *Whole Foods Market Group Inc.*, No. 8:14-cv-03035 (M.D. Fla.)); Germaine, Dollar Tree Hit With Class Action Over Background Checks, Law360 (May 18, 2015), available at http://www.law360.com/articles/656847 (discussing *Walker* v. *Dollar Tree Stores Inc.*, No. 8:15-cv-01170 (M.D. Fla.)); Grande, Home Depot Pens Deal To End FCRA Class Action, Law360 (Apr. 21, 2015), available at http://www.law360.com/articles/645948 (discussing *Fernandez* v. *Home Depot USA Inc.*, No. 8:13-cv-00648 (C.D. Cal.)); Wickham, Publix Seeks OK On $6.8M Deal Over Background Checks, Law360 (Oct. 28, 2014), available at http://www.law360.com/articles/590992 (discussing *Knights* v. *Publix Super Markets, Inc.*, No. 3:14-cv-00720 (M.D. Tenn.)) (settlement would give $48 to each class member and $2.3 million to each attorney).

Before reaching the constitutional issues, therefore, the values from clarity and dangers from the lack of clarity reasonably should inform the anterior step of ascertaining the Act's meaning in the first place. The Ninth Circuit's statutory reading markedly diverges from our Nation's constitutional tradition and widely threatens the viability of all commercial actors who are subject to the increasing plethora of regulatory requirements. This Court, by contrast, should adopt a reading of the Act that simultaneously keeps it within Article III's bounds *and* prevents it from becoming a mechanism that erodes the freedom and vitality of Americans engaged in commerce. Applying the clear-statement principles from this Court's jurisprudence to statutes that arguably depart from the Constitution's injury-in-fact requirement for standing would achieve that goal.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment below.

Respectfully submitted.

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Petitioner,

v.

THOMAS ROBINS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR *AMICI CURIAE* TIME INC. AND SEVEN MEDIA ORGANIZATIONS IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii
INTEREST OF *AMICI CURIAE* 1
SUMMARY OF ARGUMENT 3
ARGUMENT 5
I. MODERN TECHNOLOGIES FACILITATING AN INTERCONNECTED WORLD INCREASE THE MEDIA AMICI'S EXPOSURE TO CLASS ACTION LAWSUITS THAT SEEK TO EXTORT LARGE SETTLEMENTS 5
A. The Intersection of Media and Technology Has Engendered an Explosion of Interactions Between Media Companies and Consumers 5
B. The Extension of Analog-Based Statutes to Digital Technology in Wide Use by the Media Industry Is Often Used to Extort Large Settlements When No Injury-In-Fact Exists 9
1. The Video Privacy Protection Act 10
2. The Telephone Consumer Protection Act 13
C. Plaintiffs Also Have Used State Statutes to Target Media Activities, Seeking Statutory Damages in the Absence of Actual Harm 17

II. REQUIRING PLAINTIFFS TO ALLEGE A PARTICULARIZED INJURY IS NECESSARY TO LIMIT THE USE OF CLASS ACTIONS TO COERCE SETTLEMENTS AND CHILL SPEECH 20

A. Article III Standing Requirements Have Particular Importance in Class Actions, Where the Availability of Statutory Damages May Lead to Coercive Attempts to Extract Large Settlements 20

B. The Threat Of Class Actions Unrestrained By An Injury-In-Fact Requirement Will Have A Chilling Effect On Speech 25

C. Requiring an Injury-In-Fact for Article III Standing Does Not Threaten Other Important Statutory Regimes 28

CONCLUSION 36

APPENDIX A-List of *Amici* 1a

APPENDIX B-List of Counsel 4a

TABLE OF AUTHORITIES

Page(s)

Cases

Allen v. Wright,
468 U.S. 737 (1984) 22

Am. Copper & Brass, Inc. v. Lake City Indus. Products, Inc.,
757 F.3d 540 (6th Cir. 2014) 19

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521 U.S. 591 (1997) 24

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414 U.S. 538 (1974) 21

Arizona Christian Sch. Tuition Org. v. Winn,
131 S. Ct. 1436 (2011) 25

Ashcroft v. Am. Civil Liberties Union,
542 U.S. 656 (2000) 27

AT&T Mobility LLC v. Concepcion,
131 S. Ct. 1740 (2011) 21, 22

Austin-Spearman v. AMC Ntwk Entm't,
No. 14-6840, 2015 WL 1539052 (S.D.N.Y. Apr. 7, 2015) 12

Baxter v. Rodale, Inc.
555 F. App'x 728 (9th Cir. 2014) 19

Califano v. Yamasaki,
442 U.S. 682 (1979) 21

In re Capital One Tel. Cnsmr Prot. Act Litig.,
No. 11 C 5886, 2015 WL 605203 (N.D. Ill.
Feb. 12, 2015) 13

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930 F.2d 1224 (7th Cir. 1991) 32

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437 U.S. 463 (1978) 21

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901 F. Supp. 2d 1166 (N.D. Cal. Sept. 28,
2012) 18

Dombrowski v. Pfister,
380 U.S. 479 (1965) 26

Douglas v. Cunningham,
294 U.S. 207 (1935) 32

Eichenberger v. ESPN, Inc.,
No. 14-463 (W.D. Wash. May 7, 2015),
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June 9, 2015) 11

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No. 14-484, 2014 WL 5023535 (N.D. Ga. Oct.
8, 2014), *appeal docketed*, No. 14-15046
(11th Cir. Nov. 6, 2014) 11

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344 U.S. 228 (1952) 30

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523 U.S. 340 (1998) 31, 34

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441 U.S. 91 (1979) 22

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Nos. 12–CV–12831, 12–CV–14221, 12–CV–14390, 2013 WL 4012827 (E.D. Mich. Aug. 6, 2013) 18

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240 U.S. 403 (1916) 35

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471 U.S. 539 (1985) 33

Howard v. Criminal Info. Services, Inc. et al.,
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No. 11-03764, 2015 WL 1503506 (N.D. Ca. Mar. 31, 2015), *appeal docketed sub nom. Garvey v. Hulu LLC*, No. 15-15774 (9th Cir. Apr. 17, 2015) 10, 11

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No. 11-cv-03764, 2014 WL 17243444 (N.D. Cal. Apr. 28, 2014) (13 PVLR 795, 5/5/14) 27

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No. C 11-03764LB, 2013 WL 6773794 (N.D. Cal. Dec. 20, 2013) 11, 12

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No. 14-CV-11284, 2014 WL 4209575
(E.D. Mich. Aug. 26, 2014).....18

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554 F. App'x 545 (9th Cir. 2014) 19

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571 F.3d 672 (7th Cir. 2009).....23

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134 S. Ct. 1377 (2014).....33

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No. 13-cv-5794 (AKH) (S.D.N.Y. filed
Aug. 16, 2013) 15

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No. 14-00744, 2015 WL 1730068 (N.D. Ga.
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No. 1:09-cv-06344 (N.D. Ill. filed April 1,
2011) 14

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504 U.S. 555 (1992).....24

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12-cv-01953-WYD-MEH, 2013 WL 3753435
(D. Col. July 15, 2013).....33

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134 S. Ct. 8 (2013).....15

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4 F.3d 1227 (3d Cir. 1993) 29

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4 Burrows 2303, 98 Eng. Rep. 201
(K.B. 1769).....31

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Cal. April 29, 2014) 33

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No. 05:11-cv-00379-EJD, 2013 WL 1120801
(N.D. Cal. Mar. 18, 2013).....13

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Cir. Feb. 23, 2015).....10

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521 U.S. 811 (1997) 24

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No. 14-4146 (S.D.N.Y. filed June 9, 2014) 11

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559 U.S. 393 (2010) 17

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660 F.3d 487 (1st Cir. 2011) 32

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No. 90-345, 2015 WL 2340752 (D. Mass.
May 15, 2015), *appeal docketed*, No. 15-1719
(1st Cir. June 17, 2015) 11

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47 U.S.C. § 551 9

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17 U.S.C. § 504(c)(1) 29

17 U.S.C. § 1203 29

Driver's Privacy Protection Act

18 U.S.C. § 2721 9

Fair Credit Reporting Act

5 U.S.C. § 1681 *et seq.* 8, 9, 25

Family Educational Rights and Privacy Act

20 U.S.C. § 1232g 9

Federal Trade Commission Act

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5 U.S.C. § 552 28

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15 U.S.C. § 1117(c), (d) 29

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18 U.S.C. §§ 2701 – 2712 9

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15 U.S.C. § 6101 *et seq.* 23

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Telephone Consumer Protection Act,
47 U.S.C. § 227 ..... 9, 12
47 U.S.C. § 227(b)(3) 13
The Video Privacy Protection Act
18 U.S.C. § 2710(b)(1) 12
18 U.S.C. § 2710(b)(2)(E) 9
Wiretap Act
18 U.S.C. §§ 2510 – 2522 9
California Shine the Light Act
CA Civil Code § 1798.83 ..... 17, 18
Michigan Video Rental Privacy Act
M.C.L. § 445.1712 17
47 C.F.R. § 64.100 *et seq.* 13
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INTEREST OF *AMICI CURIAE*[1]

Amici include a publishing trade association and a group of companies that provide content in many forms – written, oral, textual, visual, photographic, and audiovisual – in print, radio, television, and online publications.

The Association of Magazine Media ("MPA") is a non-profit trade association that acts as the primary advocate and voice for the magazine media industry, driving thought leadership and game-changing strategies to promote the medium's vitality. The California Newspaper Publishers Association (CNPA) is a nonprofit trade association representing the daily and weekly newspapers of California.

Time Inc., A&E Television Networks, LLC, Advance Publications, Inc., Meredith Corporation, National Public Radio, Inc., and Rodale, Inc., are for-profit and non-profit media and entertainment companies engaged in the business of distributing news and content, and delivering a host of related products and services to consumers (collectively, with the MPA and CNPA, the "Media Amici").[2]

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[1] All parties have consented to this *amicus curiae* brief and letters of consent have been filed with the Clerk. Pursuant to Rule 37.6, *amicus* represents that no counsel for a party authored this brief in whole or in part, and no person or entity other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief.

[2] The Media Amici's interest in this case is limited to the Article III standing question; they express no view on the merits of the statutory violations alleged by Respondent.

The interest of the Media Amici in this case is in highlighting the extraordinary reach of the Ninth Circuit's decision to abandon the Court's long-standing and Constitutionally-based requirement that a plaintiff allege an injury-in-fact rather than a mere statutory violation, and in particular the potentially devastating impact of this decision on media companies and the related effect on speech.

SUMMARY OF ARGUMENT

Any line that may once have existed distinguishing media and content companies from technology companies has been blurred in recent years. Companies that began as distributors of software, online services or other technical solutions now publish content to wide audiences. Companies once devoted primarily to reporting news and generating other content, such as *amici curiae*, now use technological solutions in every aspect of their business. Indeed, media companies have, by necessity, become technology companies: a transition required in order to thrive in a digital era in which content must be distributed to consumers across multiple platforms, devices and media. Digital distribution, in turn, necessitates the support of an assortment of interactive tools that serve consumers' strong interest in sharing, commenting on, and otherwise connecting with that content.

This explosion of substantive interactions between consumers and media companies is enabled by an even larger number of technical, information-exchanging transactions, some of which may implicate privacy and other concerns. Class action plaintiffs, often using statutes designed in the analog era, have leveraged alleged technical violations of federal and state privacy acts and the availability of statutory damages to coerce huge settlements under the threat of enormous potential statutory awards. Media companies have been the targets of a surprisingly large number of such suits by uninjured plaintiffs, under an array of statutes. The fear of large civil damages awards, and the mere cost of waging a defense against numerous specious claims, inhibits the

development of content by media companies, and thus indirectly chills speech. This is especially true in the case of statutes such as the Video Privacy Protection Act, where the delivery of content itself (digital video) may trigger a claim.

The Ninth Circuit's approval of standing founded on a "bare" statutory violation, with no accompanying allegation of injury-in-fact, endorses the presentation to the federal courts of generalized grievances by large classes of plaintiffs that can and should be addressed by the political branches. These grievances are fundamentally different from the types of particularized, concrete injuries that underpin other statutory schemes important to media companies, such as the Copyright Act and Lanham Act. Although statutory damages are available under those regimes when economic damages are difficult to prove, the invasion of long-recognized individual property rights present in infringement cases is precisely the kind of injury-in-fact that is absent in the instant case.

In light of their firsthand experience with the chilling effects of unbridled class actions brought – or even threatened – by uninjured plaintiffs, *amici curiae* urge that this Court follow its own precedent and hold that a plaintiff must allege an actual injury in order to have standing.

ARGUMENT

I. MODERN TECHNOLOGIES FACILITATING AN INTERCONNECTED WORLD INCREASE THE MEDIA AMICI'S EXPOSURE TO CLASS ACTION LAWSUITS THAT SEEK TO EXTORT LARGE SETTLEMENTS

A. The Intersection of Media and Technology Has Engendered an Explosion of Interactions Between Media Companies and Consumers

In 2006, the Pew Research Center hosted a roundtable event at which industry experts discussed the future of the newspaper industry and changes needed to adapt to an online world. Pew Research Center, *Challenges to the Newspaper Industry* (2006), *available at* http://www.journalism.org/2006/07/24/challenges-to-the-newspaper-industry/ (last visited July 1, 2015). At that time, the questions were whether mainstream media organizations would "survive and thrive in the transition to the Internet" and whether newspapers "printed on paper" were "on a path to extinction." *Id.* Yet, as with many apocalyptic predictions, the Internet has not caused the death of all traditional media. Far from it. The printed word survives, even if it faces strong competition from other forms of media, and many media companies now prosper in the new digital environment. Similarly, broadcast and cable television have shifted content online to "streaming video," as a younger generation cuts the cable cord and opts for online video.[3]

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[3] *See*, Statement of Chairman Wheeler, *Promoting Innovation and Competition in the Provision of Multichannel Video Pro-*

Recent reports and orders from the Federal Communications Commission ("FCC") highlight the rapid transition, propelled by a convergence of consumer demand, the availability of digital technology, ubiquitous connectivity, and advanced devices. *See, e.g.*, *In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in A Reasonable & Timely Fashion, & Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, As Amended by the Broadband Data Improvement Act*, 30 FCC Rcd. 1375, 2015 WL 477864 (rel. Feb. 4, 2015) ("*FCC Advanced Telecommunications Inquiry*"). Consumers access their news and entertainment from desktop computers, tablets and mobile phones. *In the Matter of 2014 Quadrennial Regulatory Review – Review of the Commission's Broad. Ownership Rules & Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, 29 FCC Rcd. 4371, 4372, 2014 WL 1466887, *1-2 (rel. April 15, 2014). Many of these consumers reside in households that "use one or more broadband services, from multiple devices, simultaneously" and admit they never "unplug" from these devices. *FCC Advanced Telecommunications Inquiry* at 1395-1400, 2015 WL 477864, *16 (rel. Feb. 4, 2015). As a result, the entire media industry is moving more content online than ever before. *Id.* at ¶ 32, 2015 WL 477864, *14

Today, media companies' websites brim with content found in traditional print and broadcast media, but the online world also supports streaming

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gramming Distribution Services, MB Docket No. 14-261, *available at* https://www.fcc.gov/article/fcc-14-210a2 (last visited July 7, 2015).

video that accounts for 67 percent of downstream Internet traffic during peak hours. *Id.* at ¶ 30, 2015 WL 477864, *14. In March of 2014, it was estimated that more than one third of all U.S. adults watched online news videos. Pew Research Center, News Video on the Web: A Growing, if Uncertain, Part of News (2014), *available at* http://www.journalism.org/2014/03/26/news-video-on-the-web/ (last visited July 1, 2015). Consumers also want to "share" their experiences, utilizing social media to "favorite" and "pin" and "tweet" media content. 30 FCC Rcd. at ¶ 35, 2015 WL 477864, *15. ("Social networking was once dominated by young adults, but today approximately '73% of online adults now use a social networking site of some kind'"). Indeed, it is estimated that over 40% of Americans access news on social media sites, such as Facebook and Twitter. American Press Institute, *How Americans Get Their News* (2014), *available at* http://www.americanpressinstitute.org/publications/reports/survey-research/how-americans-get-news/(last visited July 1, 2015).

As a result of this rapid and far-reaching move to an online/mobile/social environment, a myriad of technical information-exchanging interactions between consumers and the media companies now occur on a continuous basis. Consumers submit comments, feedback, and requests to media company websites and forums. They forward and share articles, images and video, embed them in blog posts and on their own personal websites, and express interest by "liking" them on Facebook and other social media networks. Media companies post content, not just on their own sites, but on third-party sites such as YouTube, and in digested or clipped form on Twitter

and other news feed services. Consumers access content online, enter contests, and submit email addresses and other information in order to be alerted about topical interests, breaking news, or promotions. Some sites permit consumers to post their own content, including user-generated videos.

To support this constant information exchange, media companies often need to incorporate technology into their delivery platforms to enable the integrated use of social media, to deliver advertising, and to track the usage of their content for a variety of purposes, including analytics, research, personalization, and the delivery of interest-based advertising – all of which supports the distribution of mostly free content over the Internet that consumers have come to expect. This technology provides the touchpoints that launch the sharing of content and information between media companies and millions of individuals on a daily basis, and a wide exchange of data and ideas.

In short, almost all media companies have become "tech" companies. Although this transition has opened new markets and offers opportunities to reach consumers in diverse ways, it also exposes media companies to a new danger: class action lawsuits seeking to take advantage of the millions of information transactions between media companies and consumers, and to use those transactions as a multiplier for damages awards under statutes that provide private rights of action. The Media Amici do not dispute that the class action device serves a function in our judicial system, but believe strongly that the counterpoised peril of unchecked expansion of class actions presents a grave threat to their ability to ef-

fectively deliver news and content to the public. The doctrine of standing under Article III and the requirement of an injury-in-fact help preserve that balance, and act as an important check on unwarranted expansion of class action lawsuits.

B. The Extension of Analog-Based Statutes to Digital Technology in Wide Use by the Media Industry Is Often Used to Extort Large Settlements When No Injury-In-Fact Exists

Prior to the advent of the Internet, a number of federal statutes were enacted to protect consumer privacy, including the Fair Credit Reporting Act ("FCRA"), at issue in this case. *See Standards for Privacy of Individually Identifiable Health Information*, U.S. Dep't of Health and Human Services, 65 Fed. Reg. 82,462, 82,469 (Dec. 28, 2000) ("In the 1970s, individual privacy was paramount in the passage of the Fair Credit Reporting Act (1970), the Privacy Act (1974), the Family Educational Rights and Privacy Act (1974), and the Right to Financial Privacy Act (1978)"). Other federal statutes enacted in the same era include the Video Privacy Protection Act ("VPPA"), 18 U.S.C. § 2710; the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227; the Driver's Privacy Protection Act ("DPPA"), 18 U.S.C. § 2721; the Cable Communications Privacy Act, 47 U.S.C. § 551; the Wiretap Act (as amended by the Electronic Communications Privacy Act of 1986), 18 U.S.C. §§ 2510 – 2522; and the Stored Communications Act, 18 U.S.C. §§ 2701 – 2712. Each of these laws combines a private right of action with the potential availability of statutory damages, in lieu of actual damages. Today, these laws have been ex-

tended to online activities and used as the basis for numerous class action suits, often turning statutes drafted in an analog world into something of a digital media quagmire. Many of these lawsuits have targeted the media industry, including certain of the Media Amici. In a number of cases, the lower courts have allowed the case to move forward without allegation of injury-in-fact, as the Ninth Circuit has allowed here.

1. The Video Privacy Protection Act

The VPPA was enacted in 1988 to protect consumer privacy after a reporter published a list of movies rented by Judge Robert H. Bork, and threatened to do the same for several prominent legislators. Michael Dolan, *The Bork Tapes*, The Washington City Paper, Sept. 25 – Oct. 1, 1987, at 1, *reproduction available at* http://www.theamericanporch.com/bork5.htm (last visited July 1, 2015). Although the VPPA was drafted to protect the privacy of consumers who purchased or rented video materials from brick-and-mortar stores, courts have extended the VPPA's protections to consumers who access digital media – movies, television shows and other video programming – online. Today, the sheer volume of video materials that a single consumer can download and watch in a matter of hours can implicate thousands of dollars of statutory damages for an individual, and hundreds of millions for a class of consumers.

The potential for large monetary awards and settlements has led to many lawsuits being filed against media companies that have added videos to their websites. *See, e.g., In re Hulu Privacy Litig.*, No. 11-03764, 2015 WL 1503506 (N.D. Ca. Mar. 31,

2015), *appeal docketed sub nom. Garvey v. Hulu LLC*, No. 15-15774 (9th Cir. Apr. 17, 2015); *In re Nickelodeon Consumer Privacy Litig.*, MDL 2443, 2015 WL 248334 (D. N.J. Jan. 20, 2015), *appeal docketed*, No. 15-1441 (3d Cir. Feb. 23, 2015); *Yershov v. Gannett Satellite Info. Network, Inc.*, No. 90-345, 2015 WL 2340752 (D. Mass. May 15, 2015), *appeal docketed*, No. 15-1719 (1st Cir. June 17, 2015); *Ellis v. The Cartoon Network, Inc.*, No. 14-484, 2014 WL 5023535 (N.D. Ga. Oct. 8, 2014), *appeal docketed*, No. 14-15046 (11th Cir. Nov. 6, 2014); *Locklear v. Dow Jones & Co., Inc.*, No. 14-00744, 2015 WL 1730068 (N.D. Ga. Jan. 23, 2015), *appeal docketed*, No. 15-10698 (11th Cir. Feb. 18, 2015); *Perry v. Cable News Network, Inc.*, No. 14-1194, 2014 WL 4214873 (N.D. Ill. Aug. 25, 2014) (transfer order), *transferred*, 14-2926 (N.D. Ga. Sept. 12, 2014); *Robinson v. Disney Online d/b/a Disney Interactive*, No. 14-4146 (S.D.N.Y. filed June 9, 2014); *Eichenberger v. ESPN, Inc.*, No. 14-463 (W.D. Wash. May 7, 2015), *appeal docketed*, No. 15-35449 (9th Cir. June 9, 2015); *Austin-Spearman v. AMC Network Entm't, LLC*, No. 14-6840, 2015 WL 1539052 (S.D.N.Y. Apr. 7, 2015). In each case, plaintiffs alleged that defendants impermissibly disclosed information about consumers' viewing selections to third parties, including social networks, analytics and research companies, and advertising companies. In each case, plaintiffs failed to allege any harm other than a bare violation of the statute. Two of the district courts that have addressed the harm issue in VPPA cases both determined that no showing of actual injury is required, only a wrongful disclosure. *See In re Hulu Privacy Litigation*, No. C 11-03764LB, 2013 WL 6773794, at *4 (N.D. Cal. Dec. 20, 2013); *In re Nickelodeon Con-*

sumer Privacy Litig., MDL No. 2443, 2014 WL 3012873, at *4-5 (D.N.J. Jul. 2, 2014).

In *Hulu*, the court framed the legal issue as "whether the VPPA requires Plaintiffs to show actual injury that is separate from a statutory violation to recover actual or liquidated damages." *Hulu*, 2013 WL 6773794, at *4. The court stated that its "analysis begins with the plain language of the statute, and it ends there if the text is unambiguous," *id.* (*citing Edwards v. First Am. Corp.*, 610 F.3d 514, 517 (9th Cir. 2010)), and thus did not look beyond the VPPA's language that "a video tape service provider who knowingly discloses, to any person, personally identifiable information concerning any consumer of such provider shall be liable to the aggrieved person for the relief provided in subsection (d)."[4] *Id.* at *5; 18 U.S.C. § 2710(b)(1). Although Hulu argued that inclusion of the word "aggrieved" required plaintiffs demonstrate an injury in fact, the court concluded that "the practical import of the statute is that the words 'aggrieved person' in subsection (c) mean the same thing they do in subsection (b)(1): a consumer whose personally identifiable is disclosed by the video provider in violation of the statute." *Hulu*, 2013 WL 6773794, at *5. The "practical import" of this decision and the others that follow it, however, is that any technical violation of the statute, regardless of whether a plaintiff suffers an injury-in-fact, becomes a strict liability for a website owner, resulting in the

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[4] Both the *Hulu* court and the Seventh Circuit have acknowledged that 18 U.S.C. § 2710(b)(1) contains a typographical error and refers to subsection (d) instead of (c); *Hulu*, 2013 WL 6773794 at *5 n. 3; *Sterk v. Redbox Automated Retail, LLC*, 672 F.3d 535, 539 (7th Cir. 2012).

threat of punitive statutory damages and a windfall for plaintiffs' class action attorneys.[5]

2. The Telephone Consumer Protection Act

The TCPA was enacted in 1991 to protect consumers from intrusive telemarketing activities, at a time when telemarketing was synonymous with calls to a landline phone, usually around dinner time. Pub. L. No. 102-243, § 2(11), 105 Stat. 2394 (1991). The FCC has promulgated a series of rules implementing the TCPA and applying the decades-old statute to new technologies, including calls to cellular phones and text messages. *See* 47 C.F.R. § 64.100 *et seq.* If it is alleged that an unsolicited call or text violates the TCPA or the FCC's implementing rules, without any allegation of actual harm to the consumers as a result of the call or text, the TCPA prescribes penalties of $500 in damages for each call (and for each deficient opt-out notice), or $1,500 if the defendant "willfully or knowingly" violated the statute. 47 U.S.C. § 227(b)(3). This strict liability application of the TCPA to new technology has resulted in multi-million dollar settlements. *See In re Capital One Tel. Consumer Prot. Act Litig.*, No. 11 C 5886, 2015 WL 605203, at *2-3 (N.D. Ill. Feb. 12, 2015) (approving $75,455,099 settlement of action alleging that Capital One "called class members' cell phones using an automatic telephone dialing system or an artificial or prerecorded voice in connection with an

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[5] Many of the VPPA lawsuits referenced herein were filed by the same law firm after obtaining a $9 million settlement from Netflix, of which $2.25 million went to class counsel. *In re Netflix Privacy Litig.*, No. 05:11-cv-00379-EJD, 2013 WL 1120801 (N.D. Cal. Mar. 18, 2013).

attempt to collect on a credit card debt" without prior express consent); Uncontested Motion & Memorandum in Support of Final Approval of Class Settlement, Approval of Attorney's Fees, and Incentive Award, *Lozano v. Twentieth Century Fox Film Co.*, No. 1:09-cv-06344 (N.D. Ill. filed April 1, 2011), *final judgment and order of dismissal with prejudice* (N.D. Ill. entered April 15, 2011) (approving $16 million settlement of action alleging that defendant sent unsolicited texts advertising a DVD release to consumer cell phones).

At its most recent Open Meeting, the FCC adopted a Declaratory Ruling and Order that resolved multiple petitions filed by businesses seeking relief from an upsurge in big-dollar class action litigation under the TCPA and existing FCC implementing rules. *See* Press Release, FCC, *FCC Strengthens Consumer Protections Against Unwanted Calls and Texts* (June 18, 2015), *available at* http://transition.fcc.gov/Daily_Releases/Daily_Business/2015/db0619/DOC-333993A1.pdf (last visited July 1, 2015). As Commissioner O'Reilly said, the petitions arose from a "current state of affairs, where companies must choose between potentially crushing damages ... or cease providing valuable communications specifically requested by consumers." Oral Statement of Commissioner Michael O'Reilly, Dissenting in Part and Approving in Part, *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, WC Docket No. 07-135 (June 18, 2015) ("FCC TCPA Ruling"), *available at* http://transition.fcc.gov/Daily_Releases/Daily_Business/2015/db0619/DOC-333993A6.pdf (last visited July 1, 2015). The anticipated result of the FCC's impend-

ing order, however, is that essentially all calls made by dialing equipment other than a rotary phone will be subject to the TCPA, further incentivizing plaintiffs to file class action lawsuits that can result in large settlements. *Id.* ("I am beyond incredibly disappointed in the outcome today. It will lead to more litigation and burdens on legitimate businesses without actually protecting consumers from abusive robocalls made by bad actors"); Dissenting Oral Statement of Commissioner Ajit Pai, FCC TCPA Ruling ("This *Order* will make abuse of the TCPA much, much easier. And the primary beneficiaries will be trial lawyers, not the American public"), *available at http://transition.fcc.gov/Daily_Releases/Daily_Business/2015/db0619/DOC-333993A5.pdf* (last visited July 1, 2015). *See also Marek v. Lane*, 134 S. Ct. 8, 8-9 (2013) (Roberts, C. J., statement respecting denial of certiorari) (Facebook settled privacy class action by paying *nothing* to unnamed class members, but "paying plaintiffs' counsel and the named plaintiffs some $3 million and spending $6.5 million to set up a foundation in which [Facebook] would play a major role.")

The Media Amici are not disputing the fact that telemarketing calls can be intrusive, the validity of the TCPA and its objectives, or standing under the statute when there is actual economic or some other concrete harm, but rather that plaintiffs can be completely relieved from having to prove any injury in fact – ever. When this requirement is removed, it leads to alarming results that can be seen in the context of a pending TCPA case against Lifetime Entertainment Services, LLC. *Leyse v. Lifetime Entertainment Services, LLC*, No. 13-cv-5794 (AKH) (S.D.N.Y. filed Aug. 16, 2013). In *Leyse*, the plaintiff

has brought a putative class action – four years after the purported violation – claiming statutory damages for an alleged violation of the TCPA where defendant left a single answering machine message informing Time Warner customers that the television show *Project Runway* was now being shown on a different network in their channel lineup. Not only are there serious concerns over the statute's limitation of speech in this context, *see* Section II.B below, but plaintiff has not made any allegation of harm, instead relying solely on the bare statutory violation and the availability of statutory damages.

With the willingness to expand application of the TCPA to new communication technologies and no requirement to allege, much less prove, injury-in-fact, TCPA cases will continue to proliferate and settlement amounts will continue to rise. When media companies have the ability to send news updates to large numbers of consumers who have visited their websites and provided mobile numbers, or need to contact subscribers regarding subscription information or even debt collection, a single misstep can result in draconian penalties.[6]

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[6] In addition to the VPPA and TCPA, certain Media Amici have been sued under other federal laws containing statutory damages, in seeming attempts to find technical violations of statutes that resulted in big payouts. For example, in 2009, a claim was filed against one of the Media Amici affiliates, Oregonian Publishing Co., on the ground that plaintiffs' personal information was obtained in violation of the DPPA, which was enacted in 1994 to protect the privacy of motor vehicle records. *Howard v. Criminal Information Services, Inc. et al.*, 09-cv-01477-MO (D. Or. filed Dec. 17, 2009). The Oregonian had obtained the information for use in news stories about the safety and operation of motor vehicles. Plaintiffs did not allege any

C. Plaintiffs Also Have Used State Statutes to Target Media Activities, Seeking Statutory Damages in the Absence of Actual Harm

In addition to the various federal statutes plaintiffs rely upon to threaten large monetary judgments in the absence of actual injury, plaintiffs use various state laws to the same effect – sometimes in state courts, but often in federal courts as an attempted end-run around limitations by states that restrict class actions seeking statutory damages.[7]

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particularized harm, but rather a technical violation: that the DPPA forbids bulk purchasing of drivers' personal information for future use, because obtaining the information for future use is not itself a permitted purpose. The court ultimately dismissed plaintiff's claim because the statute did not *preclude* purchasing bulk data, and did not reach the standing issue, but not before significant expenses were incurred by the Oregonian in defending the matter.

[7] Some states restrict class claims to recover statutory damages in state court, ostensibly to prevent excessive awards in the absence of actual damages. *See, e.g.*, MCR 3.501(A)(5) ("An action for a penalty or minimum amount of recovery without regard to actual damages imposed or authorized by statute may not be maintained as a class action unless the statute specifically authorizes its recovery in a class action"); N.Y.C.P.L.R. 901(b) ("Unless a statute creating or imposing a penalty, or a minimum measure of recovery specifically authorizes the recovery thereof in a class action, an action to recover a penalty, or minimum measure of recovery created or imposed by statute may not be maintained as a class action"); *see also* Iowa R. Civ. P. 1.274(2) ("Damages fixed by a minimum measure of recovery provided by any statute may not be recovered in a class action"); N.D. R. Civ. P. 23(o)(2) (same). Plaintiffs argue these state restrictions should not apply to plaintiffs who file class action lawsuits in federal courts pursuant to the Federal Rules of Civil Procedure. *See Shady Grove Orthopedic Assoc. v. Allstate Ins. Co.*, 559 U.S. 393, 298-99 (2010) (holding that N.Y.C.P.L.R.

Some of the Media Amici have themselves been targets of these suits, including class actions alleging violations of the Michigan Video Rental Privacy Act ("MI VRPA"), M.C.L. § 445.1712, and the California Shine the Light Act, CA Civil Code § 1798.83 ("CA STL").

Similar to the VPPA, the MI VRPA seeks to protect consumer privacy by restricting unauthorized disclosure of customers' video rentals, but goes further and restricts disclosure of customers' purchase, rental or loan of "books or other written materials." In a group of consolidated cases, the Eastern District of Michigan found that "a close reading of the VRPA reveals that it contains absolutely no language to require that a claimant suffer an actual injury apart from a violation of the statute, and plaintiffs have not alleged any specific injury apart from the statutory violation." *Halaburda v. Bauer Publishing*, Nos. 12–CV–12831, 12–CV–14221, 12–CV–14390, 2013 WL 4012827, at *4 (E.D. Mich. Aug. 6, 2013); *see Kinder v. Meredith Corporation*, No. 14-CV-11284, 2014 WL 4209575, at *2 (E.D. Mich. Aug. 26, 2014) (holding that Michigan legislature can create new legal rights by virtue of enacting a statute.); *see also Deacon v. Pandora Media, Inc.*, 901 F. Supp. 2d 1166 (N.D. Cal. Sept. 28, 2012) (holding that disclosure of information sufficient to constitute injury for purposes of Article III standing).

901(b) could not bar a class action in federal court that satisfied the requirements of Fed. R. Civ. P. 23); *Am. Copper & Brass, Inc. v. Lake City Indus. Products*, Inc., 757 F.3d 540, 545-46 (6th Cir. 2014) (holding that MCR 3.501(A)(5) does not bar TCPA class actions that satisfy the requirements of Fed. R. Civ. P. 23).

In juxtaposition to the Michigan cases and the instant case, the Ninth Circuit – relying on state court interpretations of that statute – recently dismissed several cases brought by plaintiffs under the CA STL law, holding that a violation of the statute, in and of itself, was not enough. *Baxter v. Rodale, Inc.* 555 F. App'x 728, 730 (9th Cir. 2014); *Miller v. Hearst Comms.*, 554 F. App'x 657, 659 (9th Cir. 2014); and *King v. Conde Nast Publ'ns*, 554 F. App'x 545, 547 (9th Cir. 2014) (*citing Boorstein v. CBS Interactive, Inc.*, 165 Cal. Rptr. 3d 669, 675 (Cal. Ct. App. 2013) (collectively, the "CA STL cases"). Without the state interpretation, however, it is likely the Ninth Circuit would have permitted the case to move forward, as it did in the case at issue here. The CA STL cases are becoming more of an anomaly as plaintiffs move to forums and causes of action that will support awards of statutory damages for violations of the statute alone. Without the backstop of the Article III injury-in-fact requirement to limit class definition in these state statute cases, potential exposure could make the risk of an adverse decision on the merits untenable, forcing settlements rather than efficiently resolving actual controversies.

II. REQUIRING PLAINTIFFS TO ALLEGE A PARTICULARIZED INJURY IS NECESSARY TO LIMIT THE USE OF CLASS ACTIONS TO COERCE SETTLEMENTS AND CHILL SPEECH

A. Article III Standing Requirements Have Particular Importance in Class Actions, Where the Availability of Statutory Damages May Lead to Coercive Attempts to Extract Large Settlements

Under appropriate circumstances, class actions may promote the efficient resolution of litigation by providing "a convenient and economical means for disposing of similar lawsuits." *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 403 (1980); *American Pipe & Const. Co. v. Utah*, 414 U.S. 538, 553 (1974) (stating that a principal purpose of class actions is "the efficiency and economy of litigation"). They are, however, "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979). Unfortunately, this exception intended to promote efficient resolution of actual controversies can be abused by enterprising plaintiffs and counsel, as the Media Amici have witnessed firsthand.

The class procedure allows for the aggregation of claims in a manner that can create coercive pressure for defendants to settle claims that have little or no merit simply to avoid ruinous financial consequences, and the likelihood of this occurring is particularly high when a claim is asserted under a statute that provides for statutory damages, attorneys fees and costs. *Coopers & Lybrand v. Livesay*, 437

U.S. 463, 476 (1978) ("Certification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense"); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752 (2011) ("Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims"); *Thorogood v. Sears, Roebuck and Co.*, 547 F.3d 742, 745 (7th Cir. 2008) (noting the risks "when the number of claims aggregated in the class action is so great that an adverse verdict would push the defendant into bankruptcy, for then the defendant will be under great pressure to settle even if the merits of the case are slight"); *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 506 (1985) ("Many a prudent defendant, facing ruinous exposure, will decide to settle even a case with no merit. It is thus not surprising that civil RICO has been used for extortive purposes, giving rise to the very evils that it was designed to combat").

At least one recent study has found that (1) the number of companies facing class actions continues to increase, with over half of major companies engaged in class action litigation; (2) class actions are becoming more frequent, with more than a third of companies managing multiple class actions on a regular basis; (3) the potential financial exposure can be severe, even in routine class actions; (4) data privacy class actions are increasing; and (5) "more class actions are high-risk or bet-the-company matters" resulting in a high settlement rate. *The 2015 Carlton Fields Jorden Burt Class Action Survey: Best Practices in Reducing Cost and Managing Risk in Class Action Litigation* (2015), *available at*

http://classactionsurvey.com/pdf/2015-class-action-survey.pdf (last visited July 1, 2015). As the Media Amici continue to increase their use of technology for the digital distribution of content, all of the Carlton Fields Survey's results ring true, and the Media Amici find themselves facing increased data privacy class action litigation in which plaintiffs allege violations of statutes with no allegations of actual harm, but instead rely on the availability of statutory damages in an attempt to coerce the Media Amici into large settlements.

This court has previously explained the *in terrorem* character of class actions in recognizing the pressure to settle. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. at 1752, *citing Kohen v. Pacific Inv. Management Co. LLC*, 571 F.3d 672, 677–678 (7th Cir. 2009) (where potential liability is high, defendants "will be under pressure to settle rather than to bet the company, even if the betting odds are good.").

Article III constitutes one vital check on this nearly-unbridled expansion of class action lawsuits. Article III's standing requirement fundamentally is rooted in the separation of powers doctrine. *Allen v. Wright*, 468 U.S. 737, 750-52 (1984). By limiting the judiciary's jurisdiction to actual cases or controversies brought by persons who have suffered a "distinct and palpable" injury, *see Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979) (*quoting Warth v. Seldin*, 422 U.S. 490, 501 (1975)), "generalized grievances" are left to be addressed by the political branches. *Allen*, 468 U.S. at 751. Cases such as the instant case and other class action cases alleging bare violations of statutes with no allegation of injury, while superficially appearing to involve the adju-

dication of an individual plaintiff's rights, are more properly ascribed to the category of "generalized grievance." This is because they represent not an individualized, concrete harm to the ostensible class plaintiff, but rather an attempt by Congress to create an injury from observations about market practices generally. In the analog world, this often was not apparent, but the scale of purported violations in the digital age and the often virtually unlimited size of the classes highlight the generalized nature of those violations.

Indeed, it is no coincidence that in contrast to the consumer privacy laws enacted prior to the advent of the Internet, comparable laws enacted more recently typically do not contain similar private rights of action. For example, the Children's Online Privacy Protection Act ("COPPA"), 15 U.S.C. §§ 6501–6506, enacted in 1998, governs the collection, use and disclosure of information about children under the age of 13 on certain websites and does not include a private right of action. Instead, COPPA is enforced primarily by the Federal Trade Commission (FTC) pursuant to its Section 5 authority under the Federal Trade Commission Act, 15 U.S.C. § 41 *et seq.*, and state attorneys general.[8]

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[8] Similarly, in 2003, Congress enacted the Controlling the Assault of Non-Solicited Pornography And Marketing Act of 2003 ("CAN-SPAM"), 15 U.S.C. §§ 7701–7713, which was designed to reduce the amount of unsolicited and deceptive email advertising. CAN-SPAM is also primarily enforced by the FTC, and state attorneys general, but "Internet Service Providers" may also bring actions for violations of the statute, but only where they experience significant harms from unlawful emails. 15 U.S.C. §§ 7706(g)(1). While the statute includes the availability of statutory damages for each email sent or received in violation

Continued fidelity to the requirement of an injury-in-fact should create a backstop against some abuses of the class action device. The requirement that plaintiffs who invoke the judiciary's jurisdiction have a "personal stake" in a dispute, alleging "an invasion of a legally protected interest which is concrete and particularized," *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992), must be strictly enforced, *Raines v. Byrd*, 521 U.S. 811, 819 (1997), to ensure that there is a real need for the exercise of judicial power within its constitutional limits. *Summers v. Earth Island Institute*, 555 U.S. 488, 492-493 (2009). The requirement that a plaintiff sufficiently allege an "injury in fact" to invoke federal court jurisdiction is, therefore, "a hard floor of Article III jurisdiction that cannot be removed by statute." *Summers*, 555 U.S. at 497. This "hard floor" applies with equal, if not greater, force in the context of class actions. *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 612-13 (1997) ("Rule 23's requirements must be interpreted in keeping with Article III constraints "); *Arizona Christian School Tuition Org. v. Winn*, 131 S. Ct. 1436, 1449 (2011) ("In an era of frequent litigation, class actions, sweeping injunctions with prospective effect, and continuing jurisdiction to enforce judicial remedies, courts must be more careful to insist on the formal rules of standing, not less so."). Particularly in the case of the Media

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of the Act, those statutory damages are generally capped, except in certain egregious instances. *Id.* Even the Telemarketing and Consumer Fraud and Abuse Prevention Act, which as administered by the Federal Trade Commission covers much of the same ground as the earlier-enacted TCPA, *see* 15 U.S.C. § 6101 *et seq.*, provides a private right of action only where the amount in controversy exceeds $50,000 in actual damages for each person adversely affected by violations. *See id.* § 6104.

Amici, this "hard floor" also serves the important purpose of dampening the indirect effects of abusive class action lawsuits on protected speech.

B. The Threat Of Class Actions Unrestrained By An Injury-In-Fact Requirement Will Have A Chilling Effect On Speech

The threat of class action litigation by uninjured consumers seeking millions or billions of dollars in statutory damages opened up by the Ninth Circuit's decision will have an acutely chilling effect on speech, including for companies such as the Media Amici.

The Court recognized in *New York Times Co. v. Sullivan*, 376 U.S. 254, 278-279 (1964), that concern about damage awards could be more inhibiting than potential criminal liability. In the libel context, "[f]ear of large verdicts in damage suits for innocent or merely negligent misstatement, even fear of the expense involved in their defense, [will] inevitably cause publishers to 'steer ... wider of the unlawful zone'... and thus 'create the danger that the legitimate utterance will be penalized.'" *Time Inc. v. Hill*, 385 U.S. 374, 389 (1967) (*citing, inter alia*, *New York Times Co.*, 376 U.S. at, 279). The Court acknowledged that high civil awards could render First Amendment rights impotent through a process of "self-censorship." *New York Times*, 376 U.S. at 279. The Court has not restricted the rationale of *New York Times* to the law on defamation, but has adapted the reasoning to other torts. *See, e.g.*, *Hustler v. Falwell*, 485 U.S. 46 (1988) (intentional infliction of emotional distress).

Self-censorship is of particular concern in actions involving statutes such as the VPPA, where distribution of content such as online videos can trigger class action claims. Although in these cases the threat of large civil liability does not arise directly from the speech itself, but rather from the use of associated metadata and other information, the threat of class actions arising from the distribution of content has significant potential to alter the Media Amici's business practices and thus chill speech.

The Ninth Circuit's ruling poses a broad-based threat to Media Amici because it risks opening the floodgates to a variety of specious lawsuits, not only under FCRA, but under all federal and state statutes that include similar statutory damage provisions. This may force the Media Amici to face suits on multiple fronts, far-removed from their core business concerns, and at the very least to expend significant resources defending those litigations. As the Court has recognized, "[t]he chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution [of a lawsuit], unaffected by the prospects of its success or failure." *Dombrowski v. Pfister*, 380 U.S. 479, 487 (1965). That is because "the defense costs prior to trial can be extraordinarily high." *Judge and Jury in the Law of Defamation; Putting the Horse Behind the Cart*, 35 Am. U. L. Rev. 3, 91 (1985). Given these costs, publishers of expressive works "will tend to become self-censors" unless they "are assured freedom from the harassment of lawsuits[.]" *Washington Post Co. v. Keogh*, 365 F.2d 965, 968 (D.C. Cir. 1966); *see also Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 670-71 (2000). Again, although the lawsuits may not directly target expressive content, as the Media Amici are faced

with actual class action litigation and forced to settle numerous unmeritorious claims to avoid significant potential liability, or defend class actions that are ultimately dismissed, resources are diverted away from the creation of content, and speech is inevitably chilled. *The 2015 Carlton Fields Jorden Burt Class Action Survey: Best Practices in Reducing Cost and Managing Risk in Class Action Litigation* (2015), *available at* http://classactionsurvey.com/pdf/2015-class-action-survey.pdf (last visited July 1, 2015).

For instance, the threat of TCPA litigation and the uncertainty of how it will be applied (*e.g.*, whether the communication will be deemed "informational" in nature or "advertising," or whether the distribution mechanism will be deemed an "automatic telephone dialing system") has already led media companies to alter the way in which they communicate with consumers, with some deciding to forego any communications with consumers through texting platforms. Similarly, the rising threat of VPPA class action litigation may cause media companies to re-evaluate the distribution of content through video – despite the fact that growing numbers of Americans rely on the Internet to get their news and entertainment.

In *Hulu*, where transmission of data associated with viewers' interactions with online videos was at issue, the VPPA provided an exception to the prohibition on disclosure of personally identifiable information ("PII") where such disclosures were "incident to the ordinary course of business." 18 U.S.C. § 2710(b)(2)(E). The court found that any disclosure of PII in the transmission of data through Internet browser "cookies" for research and website analytics

purposes would *not* be incident to Hulu's ordinary course of business. *In re Hulu Privacy Litig.*, No. 11-cv-03764, 2014 WL 17243444, at *5 (N.D. Cal. Apr. 28, 2014) (13 PVLR 795, 5/5/14). This type of activity is necessary to support the distribution of online content. In the event courts expand the definition of PII under the VPPA, the holding would potentially subject companies such as the Media Amici to astronomical claims for statutory damages, even where this routine and essential business practice is not alleged to cause any harm.

"Freedoms of expression require 'breathing space'" to survive. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 772 (1986) (*quoting New York Times*, 376 U.S. at 272). The Article III injury-in-fact requirement provides the needed level of protection for First Amendment rights by requiring allegations of actual, particularized harm to the plaintiff caused by the challenged business practice, thereby helping mitigate the chilling effects of costly litigation. While the Court has employed a host of mechanisms to protect speech activity, in the case at hand it need rely only upon existing constitutional jurisprudence and require that plaintiffs demonstrate an injury-in-fact, in order to protect Media Amici's speech.

C. Requiring an Injury-In-Fact for Article III Standing Does Not Threaten Other Important Statutory Regimes

The necessity of alleging an injury-in-fact as a basis for Article III standing is not inconsistent with the premise that Congress can create statutory rights, or its power to establish statutory damages. For instance, when it enacted the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"), Congress creat-

ed "a private cause of action for the benefit of persons who have requested certain records from a public agency and whose request has been denied." *United States v. Richardson*, 418 U.S. 166, 204 (1974). The injury-in-fact under FOIA occurs when a person actually files a proper request, and is denied the access afforded by the statutory right. *McDonnell v. United States*, 4 F.3d 1227, 1238 (3d Cir. 1993) ("The filing of a request, and its denial, is the factor that distinguishes the harm suffered by the plaintiff in an FOIA case from the harm incurred by the general public arising from deprivation of the potential benefits accruing from the information sought.")

Nor is the requirement of an injury-in-fact in contraposition to the legal concept of defamation, a common-law tort that recognizes an actual injury to an individual's reputation, *see*, 2 KENT, COMMENTARIES ON AMERICAN LAW 21 (1827), and which the Media Amici may find themselves defending, from time-to-time. Petitioner's alleged misrepresentations that Respondent was married, had more education, and better financial wherewithal than he had in actuality do not present the type of injury that defamation claims are designed to redress which must "expo[se] [the plaintiff] to public hatred, contempt, and ridicule" *Id.*, at 13. Such statements certainly do not meet the higher presumption of injury required for defamation *per se*.

Additionally, several statutes of importance to the Media Amici contain statutory damages provisions, including the Copyright and Lanham Acts. Under the Copyright Act, a plaintiff that demonstrates infringement may elect "elect, at any time before final judgment is rendered, to recover, instead of

actual damages and profits, an award of statutory damages for all infringements involved in the action." 17 U.S.C. § 504(c)(1).[9] The Lanham Act, while limiting statutory damages to infringement cases involving counterfeit trademarks and cybersquatting, permits a plaintiff to "elect, at any time before final judgment is rendered by the trial court, to recover, instead of actual damages and profits an award of statutory damages. " 15 U.S.C. § 1117(c), (d). That a plaintiff may elect statutory damages in lieu of actual damages or infringing profits does not mean there is no underlying injury.

In his Opposition to the Petition for a Writ of Certiorari, Respondent attempted to twist this framework, claiming that the Copyright Act "has provided for over one hundred years that infringement of copyright is itself a violation that gives rise to a claim for statutory damages without proof of other injury." Opp. Mem., at 14 (*citing Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 347-352 (1998)).[10] Respondent's argument suffers two fa-

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[9] Statutory damages are also under the Digital Millennium Copyright Act. 17 U.S.C. § 1203.

[10] Respondent also cites *F.W. Woolworth Co. v. Contemporary Arts, Inc.*, 344 U.S. 228, 233 (1952) for the notion that "[e]ven for uninjurious and unprofitable invasions of copyright the court may, if it deems it just, impose a liability within statutory limits to sanction and vindicate the statutory policy." On the facts of that case, under the Copyright Act of 1909, the term "uninjurious" should not be read to mean no injury-in-fact; indeed, in that case the plaintiff proved not only that the defendant had profited economically from the infringement but also that there was economic loss by plaintiff, just in an unproven amount. *Woolworth*, and other cases under the 1909 Act addressing the courts' discretion to award statutory damages, are not standing cases, and address only the absence of economic

tal flaws. First, the Copyright Act does not dispense with the need for a plaintiff to show actual injury, only with the need to prove a quantum of economic harm. Second, to the extent that Respondent means that violation of a copyright is a bare violation of statute, this too fundamentally misunderstands the nature of intellectual property rights.

The primary purpose of statutory damages under both the Copyright and Lanham Acts is not to provide an award for a mere technical violation of the statute, but to compensate the plaintiff for invasion of a property right where actual damages or infringing profits are difficult to prove; statutory damages serve as a proxy for other forms of damages. Statutory damage provisions for copyright infringement, which as Respondent has noted have a long history, were enacted to serve this compensatory purpose. *See Millar v. Taylor*, 4 Burrows 2303, 2350, 98 Eng. Rep. 201,227 (K.B. 1769) (interpreting Statute of Anne); *Douglas v. Cunningham*, 294 U.S. 207, 209 (1935) (1909 Copyright Act); *Sony BMG Music Entm't v. Tenenbaum*, 660 F.3d 487, 502 (1st Cir. 2011) (under current Act, "Section 504's text reflects Congress's intent 'to give the owner of a copyright some recompense for injury done him, in a case where the rules of law render difficult or impossible proof of damages or discovery of profits'") (quoting *Douglas*, 294 U.S. at 209); *see also see Feltner*, 523 U.S. at 349 (citations omitted) (tracing history of statutory damages for copyright infringement). Similarly, legislative history accompanying the addition

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damage, not the absence of injury-in-fact. *See Nimmer on Copyright* § 14.04[F][1][a] (describing 1909 Act cases where no economic damages proved, but fact of injury was demonstrated and courts awarded statutory damages).

of a statutory damage provision to the Lanham Act for counterfeiting indicates that the remedy is necessary because in the face of "sophisticated, large-scale counterfeiter[s]", the task of "proving actual damages in these cases [is] extremely difficult if not impossible." S. REP 104-177, S. Rep. No. 177, Sec. 7, 104th Cong., 1st Sess. 1995, 1995 WL 709282, at *10 (Leg.Hist.). *See Sara Lee Corp. v. Bags of New York, Inc.*, 36 F.Supp.2d 161 (S.D.N.Y. 1999).[11]

A plaintiff in an intellectual property case, however, cannot be compensated – whether by a quantum of damages proven at trial or by statutory damages – unless injured in the first instance. The injury in such cases is the misappropriation of a proprietary interest through, *inter alia*, a use of that property that deprives plaintiff of his or her own right to exploit it; damages plaintiff's goodwill or reputation; creates market confusion; impedes First Amendment freedoms (including the freedom not to speak); or causes financial harm. *See Malibu Media, LLC v. John Does*, 12-cv-01953-WYD-MEH, 2013 WL 3753435 *3 (D. Col. July 15, 2013) (authors and exclusive licensees have "standing to bring suit for cop-

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[11] Similarly, the legislative history accompanying the Anticybersquatting Consumer Protection Act of 1999 states that the Act "allows trademark owners to recover statutory damages in cybersquatting cases, both to deter wrongful conduct and to provide adequate remedies for trademark owners who seek to enforce their rights in court." S. REP. 106-140, S. Rep. No. 140, 106th Cong., 1st Sess. 1999, 1999 WL 594571, *8 (Leg.Hist.). Reference to a deterrent purpose is also found in copyright cases, especially where an award at the higher end of the statutory range is appropriate. *See Chi-Boy Music v. Charlie Club, Inc.*, 930 F.2d 1224, 1229-30 (7th Cir. 1991) ("[W]hen the infringement is willful, the statutory damages award may be designed to penalize the infringer and to deter future violations").

yright infringement because each suffers injury-in-fact upon said infringement"); *Minden Pictures, Inc. v. John Wiley & Sons, Inc.*, No. c-12-4601-EMC, 2014 WL 1724478 *4 (N.D. Cal. April 29, 2014) (misappropriation of copyright without license would constitute injury-in-fact under Article III); *cf. Salinger v. Colting*, 607 F.3d 68, 81 (2d Cir. 2010) (discussing types of irreparable harm in copyright cases); *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 560 (1985) ("Courts and commentators have recognized that copyright, and the right of first publication in particular, serve this countervailing First Amendment value [of the right not to speak]"); *Pappan Enterprises, Inc. v. Hardee's Food Sys., Inc.*, 143 F.3d 800, 805 (3d Cir. 1998) (grounds for irreparable injury arising from trademark infringement include "loss of control of reputation, loss of trade, and loss of goodwill [and] the possibility of confusion"); *Lexmark Intern., Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386 (2014) (damage to business reputation provides standing under Article III to pursue Lanham Act false advertising claim).

The principle of copyright as a property right predates the United States Constitution. As this Court has noted:

> By the middle of the 17th century, the common law recognized an author's right to prevent the unauthorized publication of his manuscript. This protection derived from the principle that the manuscript was the product of intellectual labor and was as much the author's property as the material on which it was written.

Feltner, 523 U.S. at 349 (1998) (citations omitted). Invasion of a proprietary right, moreover, is quintessentially the type of concrete and particularized injury that may confer Article III standing. *See* James Leonard and Joanne C. Brant, *The Half-Open Door: Article III, the Injury-in-Fact Rule, and the Framers' Plan for Federal Courts of Limited Jurisdiction*, 54 Rutgers L. Rev. 1 (2001) ("Such harms [to proprietary rights] include not only individual property rights protected by the maligned 'private rights model' but also economic rights conferred by government. People tend to lose money or property in unique ways and afterwards suffer unique consequences."). That this is true of intellectual property rights is readily apparent: By definition, works that can be copyrighted must be original to the author and are therefore unique, and source identifiers also must be sufficiently distinguished from other indicia held by third parties in order to be protectable.

Finally, the Copyright Act does not actually create specific copyright interests by statute, but rather creates a legal framework pursuant to which an individual or entity may claim legal protections for a product of the human imagination. In other words, individuals or entities create an intangible "work," and the Copyright Act recognizes works thus created as protectable, assuming they meet certain standards such as originality. Those delineated pieces of intangible property can then be sold, leased or otherwise transferred to other parties. In principle, this is little different than laws that allow ownership of real or personal property. When a third party then misappropriates another's copyrighted work, that third party is invading a particularized interest possessed by the copyright holder, not merely a statuto-

ry provision. This is precisely the type of concrete, particularized injury required by Article III.[12]

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[12] Trademarks are similarly in the nature of a property right, *see Hanover Star Milling Co. v. Metcalf*, 240 U.S. 403, 413 (1916), and the Lanham Act also creates a framework whereby persons can use specific words, phrases, and other source indicia to create a particularized property right.

CONCLUSION

For the foregoing reasons, the Media Amici respectfully request that the decision of the Court of Appeals for the Ninth Circuit be reversed as to standing under Article III of the Constitution, and that the Court reaffirm that a plaintiff must allege an actual injury in order to demonstrate standing under Article III.

Respectfully submitted.

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APPENDIX A

Advance Publications, Inc., directly and through its subsidiaries, publishes print and digital magazines with nationwide circulation, local news in print and online in 10 states, and weekly business journals in over 40 cities throughout the United States. It also owns numerous digital video channels and internet sites and has interests in cable systems serving 2.1 million subscribers.

A&E Television Networks, LLC is an award-winning, global media content company organized under the laws of the State of Delaware with its principal place of business in New York. AETN offers consumers a diverse communications environment ranging from television networks to websites, to consumer products and educational software. AETN is comprised of A&E®, Lifetime®, History®, Lifetime Movie Network®, fyi,™, H2®, History en Español™, Crime & Investigation™, Military History™, Lifetime Real Women®, LMN™, A&E IndieFilms®, A+E Networks International®, A+E Networks Consumer Products® and A+E Networks Digital®. AETN channels and branded programming reach more than 330 million households in over 160 countries.

The **California Newspaper Publishers Association** is a non-profit trade association representing more than 800 daily, weekly and student newspapers in California. For well over a century, CNPA has defended the First Amendment rights of publishers to gather and disseminate – and the public to receive – news and information.

MPA – the Association of Magazine Media is a national trade association including in its present membership more than 175 domestic magazine publishers that publish over 900 titles sold at newsstands and by subscription. MPA members provide broad coverage of domestic and international news in weekly and biweekly publications, and publish weekly, biweekly and monthly publications covering consumer affairs, law, literature, religion, political affairs, science, sports, agriculture, industry and many other interests, avocations and pastimes of the American people. MPA has a long and distinguished record of activity in defense of the First Amendment.

Meredith Corporation is a leading media and marketing company. It creates content across media platforms in key consumer interest areas such as food, home, parenthood and health through such well-known brands as Better Homes and Gardens, Parents and Allrecipes, reaching an audience of over 200 million monthly, including 100 million unduplicated women and 60 percent of American millennial women. Meredith Corporation also owns or operates 17 television stations in fast-growing markets that reach more than 10 percent of U.S. television households.

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gramming through its website, applications and other digital platforms and technologies. In addition to broadcasting and streaming award-winning NPR programming, including *All Things Considered*® and *Morning Edition*®, NPR's Member stations are themselves significant producers of noncommercial news, information and cultural programming.

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REPLY BRIEF

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v.
THOMAS ROBINS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF TRANS UNION LLC AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICUS CURIAE*	1
SUMMARY OF THE ARGUMENT	2
ARGUMENT	4
A. Injury in Fact Is an Element of Every Private Claim Filed in Federal Court	4
B. Standing Limits Should Be Enforced Against Abusive Class Action Litigation	9
C. Statutory Damages Class Actions Under the Fair Credit Reporting Act Also Improperly Chill Protected First Amendment Activity	13
D. In Light of the Important Separation of Powers and First Amendment Concerns Presented by No-Injury Statutory Damages Claims Under the FCRA, This Court Should Construe 15 U.S.C. § 1681n to Include an Injury-in-Fact Requirement	24
CONCLUSION	32

TABLE OF AUTHORITIES

CASES Page(s)

Arizona Christian Sch. Tuition Org. v. Winn,
563 U.S. __, 131 S. Ct. 1436 (2011) 9

AT&T Mobility LLC v. Concepcion,
563 U.S. __, 131 S. Ct. 1740 (2011) 11

Bateman v. Am. Multi-Cinema, Inc.,
623 F.3d 708 (9th Cir. 2010) 12, 24

Beaudry v. Telecheck Servs., Inc.,
579 F.3d 702 (6th Cir. 2009) 6

Bell Atlantic v. Twombly,
550 U.S. 544 (2007) 11

Citizens United v. Fed. Election Comm'n,
558 U.S. 310 (2010) 18

Clapper v. Amnesty Int'l USA,
568 U.S. __, 133 S. Ct. 1138 (2013) 5, 7

Coopers & Lybrand v. Livesay,
437 U.S. 463 (1978) 11

Doe v. Chao,
540 U.S. 614 (2004) 26, 27

Doe v. Nat'l Bd. of Med. Exam'rs,
199 F.3d 146 (3d Cir. 1999) 5

Douglas v. Cunningham,
294 U.S. 207 (1935) 27

Dowell v. Wells Fargo Bank, N.A.,
517 F.3d 1024 (8th Cir. 2008) 26

Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.,
472 U.S. 749 (1985) 22, 23

TABLE OF AUTHORITIES—Continued

Page(s)

Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council, 485 U.S. 568 (1988) 30

Exxon Shipping Co. v. Baker, 128 S. Ct. 2605 (2008) 12

Fair Hous. Council v. Main Line Times, 141 F.3d 439 (3d Cir. 1998) 28

Genesis Healthcare Corp. v. Symczyk, 569 U.S. __, 133 S. Ct. 1523 (2013)..... 4

Gladstone, Realtors v. Vill. of Bellwood, 441 U.S. 91 (1979) 28

Hale v. Morgan, 22 Cal. 3d 388 (1978)..... 12

Hammer v. Sam's East, Inc., 754 F.3d 492 (8th Cir. 2014) .....*passim*

Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982) 28

Hollingworth v. Perry, 133 S. Ct. 2652 (2013) 4

Holmes v. Sec. Investor Prot. Corp., 503 U.S. 258 (1992) 27

In re Toys R Us-Delaware, Inc.-Fair & Accurate Credit Transactions Act (FACTA) Litig., 295 F.R.D. 438 (C.D. Cal. 2014)..... 10

INS v. St. Cyr, 533 U.S. 289 (2001) 30

Joint Stock Soc'y v. UDV N. Am., Inc., 266 F.3d 164 (3d Cir. 2001)..... 27

TABLE OF AUTHORITIES—Continued

Page(s)

King v. Burwell,
No. 14-114 (U.S. June 25, 2015) 24, 25

Landsgraf v. USI Film Prods.,
511 U.S. 244 (1994) 31

Leysoto v. Mama Mia I, Inc.,
255 F.R.D. 693 (S.D. Fla. 2009) 11

London v. Wal-Mart Stores, Inc.,
340 F.3d 1246 (11th Cir. 2003) 11

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992) .....*passim*

Marbury v. Madison,
5 U.S. (1 Cranch.) 137 (1803) 4

Miami Herald Pub'g Co. v. Tornillo,
418 U.S. 241 (1974)..... 18

Morrison v. Nat'l Australia Bank Ltd.,
561 U.S. 247 (2010) 30

Murray v. GMAC Mortgage Co.,
434 F.3d 948 (7th Cir. 2006) 6, 12

New York Times Co. v. Sullivan,
376 U.S. 254 (1964) 19

Nike, Inc. v. Kasky,
539 U.S. 654 (2003)..... 8, 19

NLRB v. Drivers, Chauffeurs, Helpers Loc. Union No. 639,
362 U.S. 274 (1960) 30

Owner-Operator Indep. Drivers Ass'n, Inc. v. USIS Commercial Servs., Inc.,
537 F.3d 1184 (10th Cir. 2008) 5, 6

TABLE OF AUTHORITIES—Continued

Page(s)

Paroline v. United States,
572 U.S. __, 134 S. Ct. 1710 (2014) 27

Plaut v. Spendthrift Farm, Inc.,
514 U.S. 211 (1995) 4

Raines v. Byrd,
521 U.S. 811 (1997) 5

Ratner v. Chem. Bank N.Y. Tr. Co.,
54 F.R.D. 412 (S.D.N.Y. 1972) 12

Razilov v. Nationwide Mut. Ins. Co.,
No. 01-CV-1466-BR, 2006 WL 3312024
(D. Or. Nov. 13, 2006) 10

Reed v. Town of Gilbert,
No. 13-502 (U.S. June 18, 2015) 14, 18

Rosenbloom v. Metromedia, Inc.,
403 U.S. 29 (1971) 22, 23

Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.,
559 U.S. 393 (2010) 10

Simon v. E. Ky. Welfare Rights Org.,
426 U.S. 26 (1976) 5

Singleton v. Domino's Pizza, LLC,
976 F. Supp. 2d 665 (D. Md. 2013) 21

Sorrell v. IMS Health, Inc.,
131 S. Ct. 2653 (2011) ..... *passim*

Spector v. Norwegian Cruise Line Ltd.,
545 U.S. 119 (2005) 30

Starbucks Corp. v. Super. Ct.,
168 Cal. App. 4th 1436 (2008) 27

TABLE OF AUTHORITIES—Continued

Page(s)

Steel Co. v. Citizens for a Better Env't,
523 U.S. 83 (1998) 28

Stillmock v. Weis Markets, Inc.,
385 F. App'x 267 (4th Cir. 2010) 11

Tourgeman v. Collins Fin. Servs.,
755 F.3d 1109 (9th Cir. 2014) 6, 7

Trans Union LLC v. Fed. Trade Comm'n,
536 U.S. 915, 122 S. Ct. 2386 (2002) 31

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157 Cal. App. 4th 628 (2008) 26

United States v. Bass,
404 U.S. 336 (1971) 29

United States v. Spokeo, Inc.,
No. CV12-5001-MMM(SHx)
(C.D. Cal. June 7, 2012) 7

United States v. Weiss,
467 F.3d 1300 (11th Cir. 2006) 5

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513 U.S. 64 (1994) 28

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985 F.2d 1148 (2d Cir. 1993) 6

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529 U.S. 765 (2000) ..... *passim*

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Page(s)

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Willy v. Coastal Corp., 503 U.S. 131 (1992) 5

CONSTITUTION

U.S. Const. art. II 8

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U.S. Const. amend. I ..... *passim*

STATUTES

12 U.S.C. § 5565(c) 8

28 U.S.C. § 2072 5

Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. § 5301 1

Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.* ..... *passim*

§ 1681a(f) 16

§ 1681a(p) 1

§ 1681b(b) 21

§ 1681c 18

§ 1681e(d) 14

§ 1681g(c) 18

§ 1681i(a) 16, 18

§ 1681i(b) 16, 17

TABLE OF AUTHORITIES—Continued

Page(s)

§ 1681i(c) 16

§ 1681i(d) 16, 17

§ 1681k 17

§ 1681k(a) 14, 15, 16

§ 1681n ..... *passim*

§ 1681s(a) 8

§ 1681s-2(b) 19

Pub. L. 91-508, 84 Stat. 1114 (Oct. 26, 1970) 23

Pub. L. 104-208, 110 Stat. 3009 (Sept. 30, 1996) 23, 25

RULES

12 C.F.R. pt. 1022, apps. M-N 14

Fed. R. Civ. P. 23 ..... 6, 9, 12

LEGISLATIVE MATERIALS

H.R. Conf. Rep. 104-863 (Sept. 28, 1996) 25

COURT FILINGS

Final Approval of Settlement, *LaValle v. Chexsystems, Inc.*, No. 8:08-cv-01383-AHS-RNB (C.D. Cal. Oct. 5, 2011), ECF No. 58 .. 17

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Page(s)

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J. of Class Action Settlement, *Robinson v. WFS Fin., Inc.*, No. 8:06-cv-01072-ODW-RNB (C.D. Cal. July 8, 2008), ECF No. 58.. 15

Joint Rule 26(f) Report, *LaValle v. Chexsystems, Inc.*, No. 8:08-cv-01383-AHS-RNB (C.D. Cal. May 18, 2009), ECF No. 11..... 17

Order Granting Final Approval of Class Action Settlement, *Roe v. Intellicorp Records, Inc.*, No. 1:12-cv-02288-JG (N.D. Ohio June 5, 2014), ECF No. 139 15

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Page(s)

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Settlement Agreement, *Brown v. Delhaize Am., LLC*, No. 1:14-cv-00195 (M.D. N.C. Feb. 20, 2015), ECF No. 63-1 21

Settlement Agreement, *King v. Gen. Info. Servs., Inc.*, No. 2:10-cv-06850-PBT (E.D. Pa. June 24, 2014), ECF No. 105-2 10

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Page(s)

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INTEREST OF *AMICUS CURIAE*

Trans Union LLC ("TransUnion") is a "consumer reporting agency that compiles and maintains files on consumers on a nationwide basis," as defined in Section 603(p) of the Fair Credit Reporting Act (the "FCRA" or the "Act"), 15 U.S.C. § 1681a(p). As one of the nation's three major credit bureaus, TransUnion maintains billions of pieces of information about United States consumers and issues millions of consumer reports every month. Given these functions and the consumer credit reporting system's critical importance to the national economy, TransUnion is regulated comprehensively as a "consumer reporting agency" by the FCRA, as well as by certain state mini-FCRA's and the Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. § 5301 (the "Dodd-Frank Act").[1]

TransUnion has a strong interest in ensuring that the FCRA is applied in accordance with Constitutional requirements and is properly construed. TransUnion expends millions of dollars annually to ensure compliance with credit reporting laws, regulations and relevant judicial decisions. The opinion below threatens to greatly expand FCRA liability beyond its intended scope of consumer protection, thereby exposing TransUnion, other credit bureaus, data furnishers and users of credit reports to potentially massive class action cases

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[1] Pursuant to Rule 37.3(a), letters of consent from petitioner and respondent have been filed with the Clerk of the Court. Counsel of record for all parties received timely notice of *amicus curiae's* intent to file this brief. Pursuant to Rule 37.6, *amicus curiae* certifies that no counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus curiae* and its counsel made a monetary contribution to the preparation or submission of this brief.

brought by or on behalf of persons without any real-world harm.

If this Court does not correct the Ninth Circuit's error, then the immediate result will be more "bet the company" litigation filed under the Act, inevitably reducing innovation in new data services and diminishing the scope of predictive information available to credit grantors to manage risk. Such litigation also risks introducing bias into the system of information exchange and discouraging the reporting of truthful information, thus impairing the usefulness of data relied upon by lenders, insurers, employers and landlords to make critical business decisions, and reducing the value of a good credit history to those consumers who maintain such a history. Moreover, the expense of delivering information will be higher than it would be in the absence of potentially devastating litigation risk, and some services may become wholly unavailable due to the difficulty and expense of insuring against unpredictably massive statutory damages exposure. Ultimately, consumers will bear the brunt of these effects in the form of diminished access to credit, delays in obtaining credit, and/or higher costs of obtaining it.

SUMMARY OF THE ARGUMENT

TransUnion fully supports Petitioner's argument that Article III forbids Congress from authorizing litigation in the absence of a genuine "Case" or "Controversy," and that accordingly the plaintiff's injury in fact is a necessary element of any federal civil case.

In addition to being required by the Constitution, a rule requiring pleading and proof of injury in fact has important practical implications. The legal system is currently plagued by opportunistic lawsuits seeking class relief on behalf of persons who were not injured

in any real-world sense. These cases divert attention and resources from efforts to compensate the genuinely injured. They also impair American competitiveness, reduce employment and lead to increased consumer expense, as the costs of these cases must be absorbed by the economic system as a whole.

These cases are particularly pernicious with respect to the FCRA, because credit reporting is protected First Amendment activity. Additional legal expense in this area increases the cost of obtaining credit reports, and necessarily reduces speech by discouraging data furnishers from participating in a wholly voluntary reporting system and by discouraging users from seeking credit information that may help them make more informed choices with respect to lending, leasing, insuring and hiring decisions. These are genuine chilling effects that should inform the Court's judgment here.

In other areas of the law, where interpretation of a statute may threaten an area of important constitutional concern, this Court requires a clear indication that Congress intended to tread across a constitutional boundary. The present case offers two independently sound reasons to apply such a clear statement rule. First, Congress would invade the judicial power of Article III if it were to attempt to authorize private civil litigation by persons suffering no injury in fact. Second, Congress would violate the First Amendment if it were to allow disproportionate punishment of consumer reporting agencies, as compared to similar speech by other speakers, and this intent should not be presumed. Because the FCRA contains no clear authorization of massive, enterprise-threatening class action statutory damages claims on behalf of uninjured persons, the Act should not be construed to permit such claims.

Accordingly, and for the reasons stated below, this Court should reverse or vacate the judgment of the Court of Appeals below.

ARGUMENT

A. Injury in Fact Is an Element of Every Private Claim Filed in Federal Court.

The Constitution limits the judicial power to "Cases" and "Controversies." U.S. CONST. art. III, § 2. Just as Article III protects the courts from infringements on their Constitutional powers, Article III also prohibits Congress from expanding the judicial power beyond its Constitutional limits. *See Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 217-18 (1995); *Marbury v. Madison*, 5 U.S. (1 Cranch.) 137, 176-77 (1803). The judicial branch has a "constitutionally limited role of adjudicating actual and concrete disputes." *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. __, 133 S. Ct. 1523, 1528 (2013); *see also* John G. Roberts, *Article III Limits on Statutory Standing*, 42 DUKE L.J. 1219, 1230 (1993); Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 886 (1983).

Article III requires that "the plaintiff must have suffered an 'injury in fact' – an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical. [Also] there must be a causal connection between the injury and the conduct complained of." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (internal quotations, citations and footnote omitted); *accord Hollingworth v. Perry*, 133 S. Ct. 2652, 2661 (2013) (plaintiffs lack standing unless they "seek a remedy for a personal and tangible harm"). The basic rules of standing do not change when a claim is

asserted on behalf of a putative class because the Federal Rules of Civil Procedure cannot expand the judicial power described in Article III. *See* 28 U.S.C. § 2072; *Willy v. Coastal Corp.*, 503 U.S. 131, 135 (1992).

Where a plaintiff is not injured in a real-world sense, he has no true controversy with the defendant, and thus lacks standing to sue. *See Lujan*, 504 U.S. at 560-61. "Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff that would not otherwise have standing." *Raines v. Byrd*, 521 U.S. 811, 820 n.3 (1997). This principle applies in both individual and class cases. *See Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 40 (1976). Treating any technical violation of a statute as an actual injury, regardless of its real-world effect on the plaintiff (or in a class case, a provable effect on each and every proposed class member) "improperly waters down the fundamental requirements of Article III." *Clapper v. Amnesty Int'l USA*, 568 U.S. __, 133 S. Ct. 1138, 1151 (2013).

Five Circuit Courts of Appeals already recognize that injury in fact is an element of standing, and that a plaintiff may not file a civil suit based on an alleged statutory violation that does not actually cause him harm. "The proper analysis of standing focuses on whether the plaintiff suffered an actual injury, not on whether a statute was violated." *Doe v. Nat'l Bd. of Med. Exam'rs*, 199 F.3d 146, 153 (3d Cir. 1999); *see also United States v. Weiss*, 467 F.3d 1300, 1310-11 (11th Cir. 2006) ("federal court's jurisdiction . . . can be invoked only when the plaintiff himself has suffered some threatened or actual injury resulting from the putatively illegal action") (internal citations and quotation marks omitted) (ellipses in original); *Owner-Operator Indep. Drivers Ass'n, Inc. v. USIS Commercial*

Servs., Inc., 537 F.3d 1184, 1194 (10th Cir. 2008) (recognizing that injury is an element of a claim for FCRA statutory damages); *Washington v. CSC Credit Servs., Inc.*, 199 F.3d 263, 266 (5th Cir. 2000) (the purpose of the FCRA "is not furthered unless [before filing suit] a plaintiff suffers the harm the procedures are meant to prevent"); *United States ex rel. Kreindler & Kreindler v. United Techs. Corp.*, 985 F.2d 1148, 1154 (2d Cir. 1993) ("Congress cannot waive the constitutional minimum of injury-in-fact.").

This Court should approve the reasoning of the cases requiring injury in fact as an element of every federal claim, and should reject the reasoning of the Circuits that disagree, such as in the opinion below, in *Hammer v. Sam's East, Inc.*, 754 F.3d 492, 498 (8th Cir. 2014), and in *Beaudry v. Telecheck Servs., Inc.*, 579 F.3d 702, 707 (6th Cir. 2009). These cases in essence hold that where Congress authorizes a statutory damages remedy, Article III is *per se* satisfied.[2] Perhaps the most extreme example of this analysis appears in *Tourgeman v. Collins Fin. Servs.*, 755 F.3d 1109, 1117 (9th Cir. 2014), where the Ninth Circuit allowed a class action lawsuit to proceed, seeking statutory damages under the Fair Debt Collection Practices Act based on the

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[2] The Seventh Circuit has not squarely addressed the issue. *Murray v. GMAC Mortgage Co.*, 434 F.3d 948, 953 (7th Cir. 2006), states, "That actual loss is small and hard to quantify is why statutes such as the Fair Credit Reporting Act provide for modest damages without proof of injury." However, *Murray* also says, "Rule 23(b)(3) was designed for situations such as this, in which the potential recovery is too slight to support individual suits, but injury is *substantial in the aggregate*." *Id.* (emphasis supplied). Thus, the Seventh Circuit appears to recognize that some "substantial" injury must be shown even in a case seeking only statutory damages.

sending of an allegedly defective form letter to a plaintiff who admittedly never saw the letter and was not deceived by it. According to the Ninth Circuit, "nonreceipt of the letter, or the consumer's failure to read it," were wholly immaterial. *Id.*

The Ninth Circuit's approach is incorrect because requiring a plaintiff to show actual or certainly-impending injury in fact is core to the separation of powers between the Legislative and Judicial branches. It is not enough for a private plaintiff simply to identify a legal violation and then sue on it, regardless of how the alleged violation actually affected him. *Lujan*, 504 U.S. at 559-560; *see also Washington*, 199 F.3d at 266-67 (consumer may not sue under FCRA based on allegedly unreasonable procedures designed to ensure that reports are communicated only to those with a permissible purpose to receive the reports, unless someone lacking a permissible purpose actually improperly received a report as a result of the allegedly unreasonable procedure).

Recognizing an Article III limit on no-harm class actions is therefore essential to "prevent the judicial process from being used to usurp the powers of the political branches," which include assessing new technologies and their social implications, and (when necessary) taking appropriate, measured enforcement actions on behalf of the general public. *See Clapper*, 133 S. Ct. at 1146. For example, in *United States v. Spokeo, Inc.*, No. CV12-5001-MMM(SHx) (C.D. Cal. June 7, 2012), the Federal Trade Commission entered into a consent decree with Petitioner here, mandating practice changes but not imposing such severe penalties as to put it out of business, and not requiring payments to uninjured persons.

If the Ninth Circuit's view of the FCRA and Article III is ratified, private class action plaintiffs will obtain *greater* power than public officials to penalize and bankrupt alleged FCRA violators, an absurd result. *See* 15 U.S.C. §§ 1681s(a)(2)(C) (FTC may not seek penalties under the FCRA except for violation of a prior injunction) & 1681s(a)(2)(B) (FTC's penalty determination must take into account the defendant's "ability to continue to do business" and other factors); 12 U.S.C. §§ 5565(c)(2)(A) (CFPB may not seek a penalty of more than $5,000 per day for a first violation of the FCRA) & 5565(c)(3)(C) (CFPB penalty determination must take into account "the severity of the risks to or losses of the consumer"). Even though this Court's standing jurisprudence traditionally derives from Article III, not Article II, *see Vermont Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 778 n.8 (2000), weakening Article III's injury-in-fact requirement interferes with Executive authority by delegating Article II enforcement powers to private class action attorneys. *See Lujan*, 504 U.S. at 577 (Congress may not transfer Article II powers to the courts); Tara L. Grove, *Standing as an Article II Nondelegation Doctrine*, 11 U. PA. J. CONST. L. 781, 818 (2009) ("Virtually none of the checks on executive enforcement discretion apply to private parties."). Unlike Executive Branch enforcement of FCRA requirements, no-injury statutory damages cases, as a practical matter, impose regulation wholly independent of any thoughtful agenda for achieving an appropriate balance between consumer protection and other important public policy goals, such as technological innovation, employment or the overall cost of credit. *See Nike, Inc. v. Kasky*, 539 U.S. 654, 680 (2003) (Breyer, J., dissenting) (discussing the risk that a plaintiff lacking injury in

fact could sue "unencumbered by the legal and practical checks that tend to keep the energies of public enforcement agencies focused upon more purely economic harm").

Oddly, then, because of solely judge-made law under Federal Rule of Civil Procedure 23, unelected, unappointed and unaccountable plaintiffs' class action attorneys may have more power than government officials to decide which FCRA provisions are most in need of enforcement, and which defendants should be threatened with obliteration for committing what private attorneys consider to be violations. These enforcement decisions may be made by class action attorneys without consideration of actual impact on the public or actual harm to be redressed. *See* STEPHEN BREYER, BREAKING THE VICIOUS CYCLE: TOWARD EFFECTIVE RISK REGULATION 19-20 (1993) (noting the problem of "random agenda setting" even under thoughtfully designed regulatory systems). Accordingly, this Court should again recognize: "In an era of frequent litigation, class actions, sweeping injunctions with prospective effect, and continuing jurisdiction to enforce judicial remedies, courts must be more careful to insist on the formal rules of standing, not less so." *Arizona Christian Sch. Tuition Org. v. Winn*, 563 U.S. __, 131 S. Ct. 1436, 1449 (2011).

B. Standing Limits Should Be Enforced Against Abusive Class Action Litigation.

In addition to being mandated by the Constitution, requiring injury in fact as an element of standing is necessary to preserve American competitiveness, to encourage job creation, to control the cost of credit and to protect consumers from higher prices.

The lower courts are replete with examples of FCRA lawsuits leading to large settlements because defendants cannot risk the massive exposure a statutory damage class action threatens, even in cases where neither the class representative or any specifically identifiable class member was actually harmed.[3] These unfair outcomes result from excessive settlement pressure when a massive class is certified, even if the class's liability theory is weak, because entry of a class certification order "poses the risk of massive liability unmoored to actual injury." *See Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 445 n.3 (2010) (Ginsburg, J., dissenting) (citation omitted). "Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims."

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[3] *See In re Toys R Us-Delaware, Inc.-Fair & Accurate Credit Transactions Act (FACTA) Litig.*, 295 F.R.D. 438 (C.D. Cal. 2014) (approving class settlement that could potentially award the class $391.5 million and class counsel $458,602.54 in attorneys' fees even though "no putative class member had alleged any actual injury"); Order of Final Approval of Settlement and J. at 2-3, *White v. E-Loan, Inc.*, No. 3:05-cv-02080-SI (N.D. Cal. May 11, 2007), ECF No. 136 (approving class settlement that awarded the class approximately $4.75 million, including approximately $750,000 in attorneys' fees, even though class members suffered no actual damages from the sending of an allegedly non-compliant credit offer); *Razilov v. Nationwide Mut. Ins. Co.*, No. 01-CV-1466-BR, 2006 WL 3312024, at *1 (D. Or. Nov. 13, 2006) (approving class settlement that awarded the class $19.25 million, and class counsel approximately $5.7 million in attorneys' fees, even though class members suffered no actual harm as a result allegedly non-compliant form adverse action notices); Settlement Agreement at 23, *King v. Gen. Info. Servs., Inc.*, No. 2:10-cv-06850-PBT (E.D. Pa. June 24, 2014), ECF No. 105-2 (proposed class settlement for $3.2 million, including $1 million in attorneys' fees, for reporting truthful but outdated public records information, even though there was no proof of any classwide harm from the alleged practice).

AT&T Mobility LLC v. Concepcion, 563 U.S. __, 131 S. Ct. 1740, 1752 (2011); *see also Bell Atlantic v. Twombly*, 550 U.S. 544, 559 (2007) ("the threat of discovery expense will push cost-conscious defendants to settle even anemic cases"); *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978) ("Certification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense.").

One solution to this problem is for district courts to deny class certification where the evidence shows that the proposed class as a whole suffered only *de minimis* harm, or where the proponent of the class cannot prove by objective means which specific members of the proposed class were actually harmed as a result of the challenged conduct. *See Stillmock v. Weis Markets, Inc.*, 385 F. App'x 267, 276 (4th Cir. 2010) ("To certify in cases where no plaintiff has suffered any actual harm from identity theft and where innocent employees may suffer the catastrophic fallout could not have been Congress's intent.") (Wilkinson, C.J., concurring specially); *London v. Wal-Mart Stores, Inc.*, 340 F.3d 1246, 1255 n.5 (11th Cir. 2003) (refusing to certify a statutory damages class where the defendant's potential liability "would be enormous and completely out of proportion to any harm suffered by the plaintiff") (citation omitted); *Leysoto v. Mama Mia I, Inc.*, 255 F.R.D. 693, 699 (S.D. Fla. 2009) (refusing to certify a FCRA statutory damages claim because "to grant the requested class relief would allow this Plaintiff, and his counsel, to dangle the Sword of Damocles over Defendant, without any showing of actual economic harm. the threat of annihilation associated with certification does not serve the purpose of the legisla-

tion, and moreover, is simply unnecessary to effectively enforce the Act . "); *Ratner v. Chem. Bank N.Y. Tr. Co.*, 54 F.R.D. 412, 416 (S.D.N.Y. 1972) (denying class certification because damages were negligible and "the proposed recovery of $100 each for some 130,000 class members would be a horrendous, possibly annihilating punishment, unrelated to any damage to the purported class or to any benefit to defendant, for what is at most a technical and debatable violation . ").

"The common sense of justice would surely bar penalties that reasonable people would think excessive for the harm caused in the circumstances." *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2627 (2008); *see also Hale v. Morgan*, 22 Cal. 3d 388, 402 (1978) (statutory damages provision held unconstitutional as applied because the "exercise of a reasoned discretion is replaced by an adding machine" resulting in "potentially infinite penalties, regardless of the circumstances of the violation, the offender, the victim or the damage caused"). However, the Ninth and Seventh Circuits interpret Federal Rule of Civil Procedure 23 inflexibly, denying district judges discretion to refuse certification based on lack of harm to class members or based on the risk of annihilating punishment of the defendant. *See Bateman v. Am. Multi-Cinema, Inc.*, 623 F.3d 708, 716-17 (9th Cir. 2010); *Murray*, 434 F.3d at 953-54.

Accordingly, this Court should address the Article III question squarely. In light of how aggressively statutory damages claims are presently being pursued in courts throughout the United States, in cases where no genuine harm can be identified, a definitive rule is essential. A plaintiff should not be allowed to pursue a statutory damages claim unless he has personally suffered injury in fact caused by the alleged violation. Nor should any plaintiff be allowed to pursue statutory

damages claims on behalf of other persons who did not personally suffer injury in fact caused by the alleged violation. This Court also should make it clear that the injury-in-fact requirement may be examined either at the pleading stage (as the district court below did correctly) or at the class certification stage.

C. Statutory Damages Class Actions Under the Fair Credit Reporting Act Also Improperly Chill Protected First Amendment Activity.

The present case illustrates a further problem with no-injury FCRA statutory damages class actions—a chilling effect on protected First Amendment activity. As routinely litigated today, FCRA statutory damages class actions threaten disproportionate punishment for activity protected by the First Amendment, but threaten that severe punishment only against certain speakers and listeners based solely on their legal status under the statute. This is yet another reason to recognize an injury-in-fact element for statutory damages claims asserted under the FCRA.

In the present case, a putative class action challenges nearly every aspect of an internet-based service that gathers public information from public sources, and distributes it conveniently and inexpensively to those interested in what those public sources reflect. If statutory damages are awarded on a class basis for every alleged violation, regardless of the actual impact on the proposed class as a whole or any particular member thereof, Petitioner would be bankrupted hundreds of times over. Effectively, this distributor of information would be closed down for distributing public records data, regardless of the actual impact of distribution on anyone. The First Amendment forbids such an outcome. *See Sorrell v. IMS Health, Inc.*, 131

S. Ct. 2653, 2667-68 (2011) (a statute regulating content of commercial speech must directly advance "a substantial government interest," and there must be a close fit between the means chosen and the statute's ends to ensure that the government's "interests are proportional to the resulting burdens placed on speech"); *see also Reed v. Town of Gilbert*, No. 13-502, slip op. at 6 (U.S. June 18, 2015) ("Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly-tailored to serve compelling state interests.").

The FCRA governs the transmission of even truthful information. Among other things, the FCRA compels consumer reporting agencies to give both furnishers of information and readers of reports specific notices with content dictated by the government, even if all the information transmitted is truthful. *See* 15 U.S.C. § 1681e(d); 12 C.F.R. pt. 1022, apps. M (Notice of Furnisher Responsibilities) & N (Notice of User Responsibilities). The statute also forbids consumer reporting agencies from transmitting potentially derogatory information from public records to potential employers, unless the consumer reporting agency either: (1) gives notice to the applicant for employment contemporaneous with transmission to the potential employer, or (2) employs "strict procedures designed to ensure" that the public records information is "complete and up to date." *See* 15 U.S.C. § 1681k(a). The same requirement does not apply to transmission of beneficial or neutral information from public records, or to a communication that no public records data could be found.

On its face, then, the FCRA imposes content-based burdens on speech, but only on certain speakers. Other distributors of public records information, such as newspapers, television stations or Internet search engines, are not similarly burdened. Cases filed under Section 1681k(a) routinely settle for millions of dollars, with the settlement amounts calculated not on the basis of the number of applicants denied employment as a result of inaccurate information, but rather based on the number of times the notice described under Section 1681k(a)(1) is allegedly sent too late or is incorrectly worded.[4] This application of the FCRA is troubling because liability bears no relationship to accuracy or inaccuracy, or even to financial impact on the subjects of reports, but instead depends on other factors, *i.e.*, whether the distributor can possibly be deemed a consumer reporting agency, whether the report includes public records information and whether the user is an employer. *See Sorrell*, 131 S. Ct. at 2665 ("An individual's right to speak is implicated when information he or she possesses is subjected to restraints on the way in which the information might be used or disseminated.") (internal

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[4] *See* Final Order and J. at 10-11, *Henderson v. HireRight Solutions, Inc.*, No. 3:11-cv-00558-JAG (E.D. Va. Dec. 21, 2011), ECF No. 74 ($28 million settlement based on failure to provide Section 1681k(a)(1) notice); Settlement Agreement and Release at 9-10, *Williams v. LexisNexis Risk Management, Inc.*, No. 3:06-cv-241 (E.D. Va. Feb. 20, 2008), *available at* http://web.archive.org/web/20081009014019/http://www.williamsfcrasettlement.com/pdfs/settlementAgreement.pdf ($20.7 million settlement); J. of Class Action Settlement at 3, *Robinson v. WFS Fin., Inc.*, No. 8:06-cv-01072-ODW-RNB (C.D. Cal. July 8, 2008), ECF No. 58 ($3.2 million settlement); Order Granting Final Approval of Class Action Settlement at 4-5, *Roe v. Intellicorp Records, Inc.*, No. 1:12-cv-02288-JG (N.D. Ohio June 5, 2014), ECF No. 139 ($19.6 million settlement).

quotation omitted). The exact same information could be distributed by a different kind of organization to a different kind of user, with no statutory damage risk. For example, a potential landlord could use a search engine or visit a newspaper's website to look for public information about a potential tenant, and receive the exact same information, yet neither the search engine nor the newspaper would face any statutory damages risk unless found to be a "consumer reporting agency" within the meaning of 15 U.S.C. § 1681a(f).

In response to the notice under Section 1681k(a)(1), the consumer may request that the consumer reporting agency reinvestigate the public records information under 15 U.S.C. § 1681i(a).[5] If the information previously provided cannot be "verified" (even if the information is not affirmatively *disproven*), the consumer reporting agency may not continue to report it. *See* 15 U.S.C. § 1681i(a)(5). The consumer reporting agency also must advise the consumer of the results of the reinvestigation and, upon request, inform recipients of prior reports that the information was deleted. *See* 15 U.S.C. §§ 1681i(a)(6) & 1681i(d). If the consumer disagrees with the result of the reinvestigation, he has a right to demand that the consumer reporting agency include in his file and in any future report the consumer's statement of dispute (not to exceed 100 words). See 15 U.S.C. §§ 1681i(b) & 1681i(c).[6] The consumer

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[5] One case settled for free credit monitoring and $1.5 million in attorneys' fees based on consumer reporting agency's allegedly improper requirement that the consumer prove his identity, by providing a Social Security Number, before processing a reinvestigation request. Final Order and J. at 5-6, *James v. Experian Info. Solutions, Inc.*, No. 3:12-cv-00902-REP (E.D. Va. Dec. 9, 2014), ECF No. 156.

[6] A class action under this FCRA provision settled for nearly $300,000 (including costs and a $90,000 attorneys' fee award).

also has the right to insist that his statement of dispute be delivered to past recipients of reports. *See* 15 U.S.C. § 1681i(d).

Other reporters of public records information, such as print journalists and television newscasters, are not subject to similar requirements, in spite of well-publicized examples of inaccuracy.[7] And even where a news story based on information derived from public records is not technically inaccurate, it might not be "complete and up to date," and thus would arguably violate 15 U.S.C. § 1681k if that statute's provisions were applied to the news organization. Under this Court's precedent, however, traditional media cannot be exposed to statutory damages liability if they choose

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See Final Approval of Settlement at 2, 4, *LaValle v. Chexsystems, Inc.*, No. 8:08-cv-01383-AHS-RNB (C.D. Cal. Oct. 5, 2011), ECF No. 58. The defendant reports events where a consumer wrote a check on insufficient funds. Out of concern for potential defamation liability to persons not engaged in credit reporting activity, the defendant's former policy was to request that consumers omit from Section 1681i(b) statements any names of individuals or businesses other than the specific individual or business who furnished the bad-check data to the defendant; plaintiff contended that the FCRA bars consumer reporting agencies from imposing any such content restrictions on consumer statements. *See id.* (May 18, 2009) (Joint Rule 26(f) Report), EFC No. 11. The case did not involve a claim that the bad-check reporting was inaccurate as to any class member.

[7] "Young, upcoming lying reporters like onetime New York Times fabulist Jayson Blair and The New Republic's past stable of fantasy writers—Stephen Glass, Scott Beauchamp, and Ruth Shalit—had their work finally disowned by their publications. Former Washington Post reporter Janet Cooke got her Pulitzer Prize revoked for fabricating a story." Victor David Hanson, *Brian Williams' Truth Problem, and Ours*, NATIONAL REVIEW, Feb. 12, 2015, http://www.nationalreview.com/article/398416/brian-williamss-truth-problem-and-ours-victor-davis-hanson.

to report public records information without giving the subjects of such reporting notice of the reporting, the opportunity to demand reinvestigation or the right to force publication of the subject's rebuttal statement if reinvestigation of the item is not resolved to the subject's satisfaction. *See Miami Herald Pub'g Co. v. Tornillo*, 418 U.S. 241, 256-57 (1974) (invalidating Florida statute allowing plaintiff to seek statutory damages against a newspaper for refusing to publish plaintiff's rebuttal to a news report).

As presently litigated, the FCRA greatly burdens the speech of consumer reporting agencies, even though the same information is often transmitted by parties not regulated by the FCRA. Permitting FCRA statutory damages litigation by or on behalf of uninjured parties risks violating the First Amendment principle that *the identity of the speaker* cannot justify greater burdens on otherwise protected speech. *See Reed v. Town of Gilbert*, slip op. at 13 ("a law limiting the contents of newspapers, but only newspapers, could not evade strict scrutiny simply because it could be characterized as speaker based"); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 340, 130 (2010) ("Speech restrictions based on the identity of the speaker are all too often simply a means to control content.").

Under libel law the plaintiff must prove an inaccurate publication, but under the FCRA, liability may attach for a host of reasons unrelated to inaccuracy, such as failing to give a required notice (*see* 15 U.S.C. § 1681g(c)), for reporting an accurate item longer than the statute allows (*see* 15 U.S.C. § 1681c) or for failing to respond quickly enough to a credit reporting dispute (*see* 15 U.S.C. § 1681i(a)(1), (2)). Since so many FCRA statutory damages class actions are not based on alleged inaccuracy, but rather on some other statutory

requirement not imposed on traditional media, the risk of discouraging distribution of truthful information is real and severe. *See Nike*, 539 U.S. at 679 ("a private 'false advertising' action brought on behalf of the State, by one who has suffered no injury, threatens to impose a serious burden upon speech") (Breyer, J., dissenting); *New York Times Co. v. Sullivan*, 376 U.S. 254, 294-95 (1964) (Black, J., concurring) (discussing how civil litigation may impair protected First Amendment activity).

Data furnishers also have potentially significant exposure to statutory damages claims by uninjured persons asserting violations of 15 U.S.C. § 1681s-2(b). It is rare for a single item, inaccurate in a small detail, to actually result in a denial of credit, but furnishers may choose to avoid reporting questioned items regardless of their truth or falsity, simply to avoid risk of suit. Data furnishers' participation in the credit reporting system, although essential for its operation, is purely voluntary, and the risk associated with no-injury statutory damages lawsuits will discourage participation from furnishers who might otherwise wish to provide positive information into the system. This is potentially damaging to first-time and second-chance borrowers, who may benefit from having their credit files supplemented with information from smaller lenders or from non-traditional furnishers of information, such as utility companies or landlords. Recent analysis by the Consumer Financial Protection Bureau indicates that, as of 2010, approximately 11% of Americans are "credit invisible," in that the credit reporting system lacks sufficient information about them to issue a credit score.[8] The problem of credit

[8] *See* KENNETH P. BREVOORT ET AL., CONSUMER FIN. PROT. BUREAU'S OFFICE OF RESEARCH, DATA POINT: CREDIT INVISIBLES

invisibility may be mitigated by allowing alternative payment data into the system.[9] For example, a pattern of regular payments of utility bills or rent may show a consumer to be more creditworthy than one who does not make regular payments. Data furnishers' fear of liability, however, can discourage them from making their data available, particularly when the risk is of annihilating statutory damages liability bearing no relationship to anyone's actual harm.[10] *Sorrell* described credit reporting as protected First Amendment activity. 131 S. Ct. at 2667. Thus, as a "law abridging the freedom of speech," the FCRA is inherently in tension with the First Amendment, and must be scrutinized carefully whenever its interpretation may discourage legitimate distribution of credit or public records information, or when its interpretation discourages furnishers from their voluntary participation in the system.

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6 (May 2015), http://files.consumerfinance.gov/f/201505_cfpb_data-point-credit-invisibles.pdf.

[9] *See* MICHAEL A. TURNER ET AL., POLICY & ECONOMIC RESEARCH COUNCIL (PERC), RESEARCH CONSENSUS CONFIRMS BENEFITS OF ALTERNATIVE DATA 18 (March 2015), http://www.perc.net/wp-content/uploads/2015/03/ResearchConsensus.pdf.

[10] *See* JULIA S. CHENY, PAYMENT CARDS CENTER NEWSLETTER, ALTERNATIVE DATA AND ITS USE IN CREDIT SCORING THIN-AND-NO-FILE CONSUMERS 15 (Summer 2008), https://www.philadelphiafed.org/consumer-credit-and-payments/payment-cards-center/publications/discussion-papers/2008/D2008FebAlternativeData.pdf ("Without clear regulatory direction, utilities, including telecommunications companies, have been hesitant to report full-file consumer data. Additionally, data furnishers will be subject to requirements and obligations set forth in the Fair Credit Reporting Act (FCRA) and, as amended, by the Fair and Accurate Credit Transactions Act of 2003 (FACTA), adding often unfamiliar compliance responsibilities.").

The FCRA also exposes *readers* to uniquely dangerous statutory damages risks. The FCRA contains a grab-bag of duties imposed on users of reports, potentially penalizing them for purely technical errors, such as for including extraneous information on a form seeking a potential employee's consent to obtain a consumer report about him. *See* 15 U.S.C. § 1681b(b)(2)(A)(i). Multi-million dollar settlements under this provision have become routine.[11] Similarly sized settlements also are frequent under 15 U.S.C. § 1681b(b)(3), which requires a potential employer to give specialized notice to a job applicant before taking adverse action based on the information in a report.[12] By contrast, an

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[11] *See* Final Order and J. at 8, *Marcum v. Dolgencorp, Inc.*, No. 3:12-cv-00108 (E.D. Va. Mar. 4, 2015), ECF No. 92 (approving class settlement that awarded the class approximately $4 million, including attorneys' fees of $1 million, even though no actual damages occurred as a result of a purely technical violation); Final Approval Order and J. at 2, *Knights v. Publix Super Markets, Inc.*, No. 3:14-cv-00720 (M.D. Tenn. Nov. 12, 2014), ECF No. 72 ($6.8 million settlement); Final Order and J. at 6, *Ellis v. Swift Transp. Co. of Ariz., LLC*, No. 3:13-cv-00473 (E.D. Va. Oct 7, 2014), ECF No. 59 ($5 million settlement); Pl.'s Motion for Prelim. Approval of Class Action Settlement at 7, *Fernandez v. Home Depot USA, Inc.*, No. 8:13-cv-00648 (C.D. Cal. Apr. 20, 2015), ECF No. 38 ($1.8 million settlement); *Singleton v. Domino's Pizza, LLC*, 976 F. Supp. 2d 665, 682 (D. Md. 2013) ($2.5 million settlement).

[12] *See* Settlement Agreement at 5, *Brown v. Delhaize Am., LLC*, No. 1:14-cv-00195 (M.D. N.C. Feb. 20, 2015), ECF No. 63-1 (providing for a class settlement fund value of approximately $3 million, and granting class counsel approximately $1 million in attorneys' fees, even though class members suffered no actual damages); Final Order and J. at 7, *Pitt v. K-Mart Corp.*, No. 3:11-cv-00697 (E.D. Va. May 24, 2013), ECF No. 75 ($3 million settlement); Final Order and J. Approving Settlement at 5-6, *Bell v. US Xpress, Inc.*, No. 1:11-cv-00181-CLC-WBC (E.D. Tenn. Jan. 21, 2015), ECF No. 71 ($2.75 million settlement); Order Granting

employer faces no potential liability for basing employment decisions on search engine results, and is not required to seek applicants' consent before having its own personnel department comb through the Internet. Huge FCRA settlement payments discourage legitimate access to credit reporting, out of users' fear that the potential liability risk outweighs the value from the information to be obtained. Instead, some employers rely on wholly unregulated technologies to make decisions affecting consumers' livelihoods, even though these may be less reliable than credit reports and even though consumers may have less practical ability to correct harmful inaccurate information or to learn what particular piece of information led to an adverse decision.[13]

Focusing the damages inquiry on actual harm always has been a key component of First Amendment and defamation jurisprudence intended to minimize chilling effects on speech. As Justice Brennan explained, speaking for himself and three other Justices, "The ready availability and unconstrained application of presumed and punitive damages in libel actions is too blunt a regulatory instrument . . 'the underlying aim of the law is to compensate for harm actually caused.'" *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 778-79 (1985) (Brennan, J., dissenting) (quoting *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 73

Final Approval of Settlement at 5, *Hunter v. First Transit, Inc.*, No. 1:09-cv-06178 (N.D. Ill. Sept. 9, 2011), ECF No. 79 ($5.9 million settlement).

[13] *See* JON RONSON, SO YOU'VE BEEN PUBLICLY SHAMED 69-70 (2015) (describing employee termination based solely on Twitter information); Victoria Fitzgerald, *Is it wrong to google a job candidate*, FINANCIAL TIMES, Nov. 8, 2013, http://www.ft.com/cms/s/0/303e35be-e330-11e2-bd87-00144feabdc0.html#axzz3e7nExwW7.

(1971) (Harlan, J., dissenting)). Three Justices described common-law rules permitting presumed damages in defamation cases as a consequence of circumstances where proof of specific damages would be impossible but nevertheless "from the character of the defamatory words and the circumstances of publication, it is all but certain that serious harm has resulted in fact." *Id.* at 760 (Powell, J.) (quoting W. Prosser, *Law of Torts* § 112, p. 765 (4th ed. 1971)). "The common law [also] recognizes that credit reporting is quite susceptible to libel's chill; this accumulated learning is worthy of respect." *Id.* at 792 (Brennan, J., dissenting).[14]

To allow unrestrained FCRA statutory damages claims by or on behalf of uninjured persons creates serious First Amendment concerns. This provides further justification for this Court to uphold its prior Article III jurisprudence, and to reverse or vacate the Ninth Circuit's decision below. This Court should rule that FCRA statutory damages claims may not be pursued by or on behalf of uninjured persons.

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[14] Justice Brennan suggested that the FCRA, as then in effect, appeared to comport with the First Amendment as "appropriate regulation designed to prevent the social losses caused by false credit reports." *See id.* at 795-96 & n.19. However, the Act did not permit statutory damages then, and the version of 15 U.S.C. § 1681n currently before the Court was enacted eleven years after *Dun & Bradstreet*. *See* Pub. L. 104-208, 110 Stat. 3009, 3009-446 (Sept. 30, 1996). The FCRA previously authorized, for a willful violation, "such amount of punitive damages as the court may allow." *See* Pub. L. 91-508, 84 Stat. 1114, 1134 (Oct. 26, 1970).

D. In Light of the Important Separation of Powers and First Amendment Concerns Presented by No-Injury Statutory Damages Claims Under the FCRA, This Court Should Construe 15 U.S.C. § 1681n to Include an Injury-in-Fact Requirement.

This Court may avoid deciding the core Article III constitutional question by construing 15 U.S.C. § 1681n to contain an injury-in-fact requirement.

Nothing in the statute suggests clear Congressional intent to permit statutory damages claims by or on behalf of wholly uninjured persons. Without such a clear indication, the statute should be construed narrowly to ensure its compliance with Article III. Congress passed the FCRA to improve the credit reporting system, but to allow massive no-harm statutory damages classes threatens to destroy that system. Congress did not intend to allow such cases and no "fair understanding of the legislative plan" is consistent with the Ninth Circuit's approach. *Cf. King v. Burwell*, No. 14-114, slip op. at 21 (U.S. June 25, 2015).

The FCRA itself contains no indication of Congressional intent to allow private litigation at the outer limits of Article III standing rules. Nor is there any meaningful legislative history suggesting Congress understood that massive statutory damages class actions would be pursued under 15 U.S.C. § 1681n on behalf of uninjured consumers. *See Bateman*, 623 F.3d at 718 n.7 ("there was no discussion on how Congress arrived at the range of statutory damages or the appropriateness of that remedy").

The 1996 amendment to the FCRA that includes the current language of 15 U.S.C. § 1681n focused in large

part on expanding the compliance duties imposed on furnishers of credit data to consumer reporting agencies. *See* Pub. L. 104-208, 110 Stat. 3009, 3009-446 (Sept. 30, 1996). The 1996 amendment was attached to a mammoth 750-page appropriations bill, with little Congressional discussion. The House Conference Committee Report does not specifically discuss the amendment to Section 1681n, but merely references in a general sense "a number of revisions to the Fair Credit Reporting Act" as a whole, intended to respond to "information technology advances that have occurred over the last twenty years" since the FCRA was first enacted. H.R. Conf. Rep. 104-863 at 1175-76 (Sept. 28, 1996). Nothing suggests any careful contemplation or specific intent by Congress to convert the FCRA into the powerful litigation weapon it has lately become. *See Hammer*, 754 F.3d at 509 ("it does not make sense to assume Congress intended to confer a windfall on consumers who face no reasonable likelihood of harm, let alone any actual harm") (Riley, C.J., dissenting); *cf. King v. Burwell*, slip op. at 14 (health care statute "does not reflect the type of care and deliberation that one might expect of such significant legislation").

The FCRA says only that a defendant "who willfully fails to comply with any requirement" of the Act "with respect to any consumer is liable to that consumer in an amount equal to the sum of [] [] any actual damages sustained by the consumer as a result of the failure or damages of not less than $100 and not more than $1,000." 15 U.S.C. § 1681n(a)(1)(A). Read properly, this provision means that where damages are genuine but small, or difficult to quantify, the damaged consumer is guaranteed a minimum recovery. Nonetheless, some real-world impact on the plaintiff still must be shown as a precondition to suit, unless Congress

clearly indicated that the contrary interpretation should follow. Congress did not so indicate, and use of the word "damages" (rather than "penalty") indicates that the $100-$1,000 range described is intended to approximate or enhance damages that actually occurred but might be difficult to measure. "Congress presumably expected the federal courts to require factual harm under Article III's injury in fact prong." *Hammer*, 754 F.3d at 509 (Riley, C.J., dissenting); *see also Trujillo v. First American Registry, Inc.*, 157 Cal. App. 4th 628, 637-38 (2008) (California credit reporting statute construed to include injury-in-fact requirement).

"A reasonable reading of the statute could still require proof of actual damages but simply substitute statutory rather than actual damages for the purpose of calculating the damage award." *Dowell v. Wells Fargo Bank, N.A.*, 517 F.3d 1024, 1026 (8th Cir. 2008). Two judges of a later Eighth Circuit panel rejected this statement in *Dowell*, calling it dicta. *Hammer*, 754 F.3d at 499. Chief Judge Riley disagreed, describing the Dowell analysis as both "eminently reasonable" and necessary to avoid "offering a doubtful answer to a difficult constitutional question." *Id.* at 508 (Riley, C.J., dissenting); *see also Wallace v. ConAgra Foods, Inc.*, 747 F.3d 1025, 1031 (8th Cir. 2014) (interpreting the Class Action Fairness Act to require an allegation of injury in fact because Congress cannot be presumed to have "intended to stretch, if not breach, the constitutional limits on federal jurisdiction").

As this Court recognized in interpreting a different statute, "a guaranteed minimum" statutory damages must be "contingent upon some showing of actual damages, thereby avoiding giveaways to plaintiffs with nothing more than abstract injuries . " *Doe v. Chao*,

540 U.S. 614, 625-26 (2004) (citation and internal quotation omitted); *see also Paroline v. United States*, 572 U.S. __, 134 S. Ct. 1710, 1720 (2014) ("[T]his Court has more than once found a proximate-cause requirement built into a statute that did not expressly impose one."); *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 266 (1992) (noting the unlikelihood that Congress intended for literally "all factually injured plaintiffs" to recover under the Racketeer Influenced and Corrupt Organizations Act); *Joint Stock Soc'y v. UDV N. Am., Inc.*, 266 F.3d 164, 176 (3d Cir. 2001) (Alito, J.) (observing that plaintiffs lacked standing under the Lanham Act because they failed to allege that defendants' alleged misconduct "harmed" them and thus lacked "injury in fact"); *Starbucks Corp. v. Super. Ct.*, 168 Cal. App. 4th 1436, 1449 (2008) (construing statutory damages provision to require proof of injury and causation to avoid turning "the statute into a veritable financial bonanza . . . and to avoid absurd consequences, including an unconstitutionally excessive penalty").

The few cases suggesting that statutory damages may be awarded without quantified proof of harm involve unique situations, and do not undermine the grounds for construing the FCRA narrowly to forbid statutory damages without injury in fact. *Douglas v. Cunningham*, 294 U.S. 207, 209 (1935), for example, observed that copyright statutory damages address the problem of "difficult or impossible proof of damages or discovery of [the defendant's] profits." Moreover, there is unjust enrichment in a copyright case, as the infringer takes compensation that the author otherwise could gain through sale or license of an authorized copy. Similarly, the standing of a *qui tam* relator, which derives from actual financial injury to the government, is deeply embedded in the Anglo-American legal system, having been frequently approved of by

multiple Congresses and before then multiple English Parliaments. *See Vermont Agency*, 529 U.S. at 776-78. "Tester" standing under the Fair Housing Act was justified on the grounds that Congress indicated a clear intent to allow suits to the maximum degree permitted by Article III. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 372-74, n.14. (1982); *Gladstone, Realtors v. Vill. of Bellwood*, 441 U.S. 91, 103, n.9, 109 (1979). Yet even in *Havens* this Court said that the plaintiffs might be unable to prove injury in fact in compliance with Article III, and that if they could not, the case should be dismissed. 455 U.S. at 378; *see also id.* at 382-83 (Powell, J., concurring) (expressing doubt about the plausibility of the standing allegation); *see also Fair Hous. Council v. Main Line Times*, 141 F.3d 439, 444 (3d Cir. 1998) ("a violation of the [Fair Housing] Act does not automatically confer standing on any plaintiff, even one who holds the status of a private attorney general").

This Court should explain that where a statute does not clearly authorize a lawsuit that might violate Article III standing limits, the statute should be construed not to authorize such a suit, pursuant to the "settled policy of adopting acceptable constructions of statutory provisions in order to avoid the unnecessary adjudication of constitutional questions." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 133 (1998) (Stevens, J., concurring); *see also id.* at 134 (Ginsburg, J., concurring) ("resist expounding or offering advice on the constitutionality of what Congress might have done, but did not do"). Moreover, the First Amendment implications of an expansive reading of the FCRA provide further justification for a narrow construction of 15 U.S.C. § 1681n because credit reporting is protected speech. *See United States v. X-Citement Video, Inc.*, 513 U.S. 64, 69 (1994) (statute should

be interpreted to avoid "substantial constitutional questions" under the First Amendment).

The FCRA nowhere states expressly that statutory damages may be recovered by or on behalf of consumers who suffered no harm at all. It certainly does not state that a class action may be pursued for massive statutory damages on behalf of thousands or millions of persons lacking any injury in fact. Without such a clear indication, the statute should not be construed to authorize such suits. Indeed, the statute is being litigated in a fashion that Congress did not contemplate and that distorts its purpose. *See Washington*, 199 F.3d at 267 (rejecting "plain language argument" for broad class certification order including persons not injured by alleged procedures violation; "In light of the purposes of the FCRA, we find that the actionable harm the FCRA envisions is improper disclosure, not the mere *risk* of improper disclosure that arises when 'reasonable procedures' are not followed and disclosures are made.") (emphasis in original); Richard A. Nagareda, *Aggregation and its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and CAFA*, 106 COLUM. L. REV. 1872, 1886 (2006) (addressing a different statutory damages statute; "The distortion of the underlying remedial scheme comes from the aggregation of statutory damages seemingly set forth by Congress with the scenario of individual litigation in mind.").

Without a clear indication that Congress desired to allow statutory damages suits without any damages (rather than if damages are concrete but small), the FCRA should not be construed to permit such suits. *See United States v. Bass*, 404 U.S. 336, 349-50 (1971) ("the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into

issue, the critical matters involved in the judicial decision"); *Vermont Agency*, 529 U.S. at 788-89 (Ginsburg, J., concurring) ("I do not find in the False Claims Act any clear statement subjecting the States to *qui tam* suits brought by private parties ."). As explained above, FCRA statutory damages lawsuits implicate important separation of powers and First Amendment issues, but "as a general matter, when a particular interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result." *INS v. St. Cyr*, 533 U.S. 289, 299 (2001); *see also Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988) ("The courts will therefore not lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it.").

This Court often requires clear-statement rules when Congress may have impinged upon an important area of constitutional concern, or when the particular application of a statute "would intrude on sensitive domains in a way that Congress is unlikely to have intended had it considered the matter." *Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119, 139 (2005); *see also NLRB v. Drivers, Chauffeurs, Helpers Loc. Union No. 639*, 362 U.S. 274, 284 (1960) (statute should not be construed to restrict right to picket peacefully without clear statement by Congress). The Court should apply a clear-statement rule here as well because to allow FCRA suits by uninjured plaintiffs, or on behalf of uninjured class members, would present difficult separation of powers and First Amendment issues, as discussed in greater detail above, and nothing suggests that Congress considered these issues. *See Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 265 (2010) (observing that the Securities

Exchange Act of 1934 does not permit class actions based on extraterritorial activity because the statute lacks any "affirmative indication" by Congress to permit such suits).

No-injury statutory damages class actions should not be allowed under the FCRA unless Congress has given a clear indication to allow such lawsuits, in light of the "high stakes" involved. *See Landsgraf v. USI Film Prods.*, 511 U.S. 244, 259 (1994). Extremely high stakes are involved here, where any potential violation can trigger a class action lawsuit that, regardless of its ultimate merit, will pose an existential threat to the targeted business. *See Trans Union LLC v. Fed. Trade Comm'n*, 536 U.S. 915, 122 S. Ct. 2386, 2387 (2002) (Kennedy, J., dissenting from denial of certiorari) ("Because the FCRA provides for statutory damages of between $100 and $1,000 for each willful violation, petitioner faces potential liability approaching $190 billion. If the Court of Appeals' decision is given collateral-estoppel effect in these class actions (as the class-action plaintiffs seek), petitioner will face crushing liability.").

Chief Judge Riley of the Eighth Circuit, dissenting in *Hammer*, warned that interpreting 15 U.S.C. § 1681n(a)(1) to permit statutory damages without any underlying injury in fact

> will lead to results Congress cannot have intended. A retailer earning less than $100 per average receipt could not afford a $100 penalty per receipt, let alone $1,000. The district court took the fact that damages would exceed $1 billion despite the absence of a penny's worth of injury as a sign that Congress probably knew not what they wrought.

754 F.3d at 509 (internal quotations omitted).

Properly construed, 15 U.S.C. § 1681n(a) permits enhancement of small but concrete damages into the $100-$1,000 range, if a willful violation is shown, but the statute does not authorize an automatic recovery of $100-$1,000 for violations that do not cause injury in fact. This Court should rule that FCRA claims may not be pursued by or on behalf of persons who did not suffer injury in fact resulting from the particular substantive statutory violation alleged.

CONCLUSION

For the foregoing reasons, this Court should reverse or vacate the judgment of the Court of Appeals, and further, this Court should explain that no FCRA claim may be pursued by or on behalf of a person who did not sustain concrete injury in fact.

Respectfully submitted,

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REPLY BRIEF

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No. 13-1339

IN THE

Supreme Court of the United States

SPOKEO, INC.,

Petitioner,

v.

THOMAS ROBINS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether Congress may confer Article III standing upon a plaintiff who suffers no concrete harm, and who therefore could not otherwise invoke the jurisdiction of a federal court, by authorizing a private right of action based on a bare violation of a federal statute.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES v

INTERESTS OF *AMICUS CURIAE* 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 5

ARGUMENT 8

I. INJURY-IN-FACT STANDING IS A CRUCIAL ARTICLE III BULWARK PROTECTING THE SEPARATION OF POWERS 8

A. The Constitution Demands a Clear Separation of Powers Among the Three Branches of Government 8

B. Article III's Injury-in-Fact Requirement for Standing Is Grounded Entirely in Separation-of-Powers Concerns 10

II. PERMITTING FEDERAL COURTS TO ADJUDICATE SUITS BROUGHT BY PLAINTIFFS WHO LACK A CONCRETE INJURY VIOLATES THE SEPARATION OF POWERS 13

A. The decision below contravenes Article III's requirement that the judicial power extends to only true "Cases" or "Controversies" 13

B. The decision below contravenes Article II's requirement that the President "take Care" that the laws are faithfully executed 17

C. The Executive Branch may not acquiesce to encroachments on its constitutionally assigned powers 22

CONCLUSION 23

TABLE OF AUTHORITIES

Page(s)

CASES

Allen v. Wright,
468 U.S. 737 (1984) 12, 18, 19

Beaudry v. TeleCheck Servs., Inc.,
579 F.3d 702 (6th Cir. 2009) 5

Boumediene v. Bush,
553 U.S. 723 (2008) 1

Bowsher v. Synar,
478 U.S. 714, 722 (1986) 10

Buckley v. Valeo,
424 U.S. 1 (1976) 9, 18, 22

Clapper v. Amnesty Int'l USA,
133 S. Ct. 1138 (2013) 1

Clinton v. Jones,
520 U.S. 681 (1997) 13

Clinton v. New York,
524 U.S. 417 (1998) 9

DaimlerChrysler Corp. v. Cuno,
547 U.S. 332 (2006) 12

Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.,
561 U.S. 477 (2010) 1, 17, 18

Page(s)

Frothingham v. Mellon,
262 U.S. 447 (1923) 6

Gladstone Realtors v. Village of Bellwood,
441 U.S. 91 (1979) 16

Havens Realty Corp. v. Coleman,
455 U.S. 363 (1982) 16

INS v. Chadha,
462 U.S. 919 (1983) 22

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992) 5, 7, 16, 18

Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.,
501 U.S. 252 (1991) 9

Morrison v. Olson,
487 U.S. 654 (1988) 7, 10, 20, 21

New York v. United States,
505 U.S. 144 (1992) 22

O'Donoghue v. United States,
289 U.S. 516 (1933) 9

Printz v. United States,
521 U.S. 898 (1997) 17

Raines v. Byrd,
521 U.S. 811 (1997) 16

Page(s)

Schlesinger v. Reservists Comm. to Stop the War,
418 U.S. 208 (1974) 15

Sierra Club v. Morton,
405 U.S. 727 (1972) 17

Steel Co. v. Citizens for a Better Env't,
523 U.S. 83 (1998) 1, 11, 19

Summers v. Earth Island Inst.,
555 U.S. 488 (2009) 11, 14

Valley Forge Christian Coll. v. Ams. United for Separation of Church & State,
454 U.S. 464 (1982) 15

Warth v. Seldin,
422 U.S. 490 (1975) 11, 16

Whitmore v. Arkansas,
495 U.S. 149 (1990) 10

Youngstown Sheet & Tube Co. v. Sawyer,
343 U.S. 579 (1952) 10

CONSTITUTIONAL PROVISIONS

U.S. CONST. art. I, § 1 9

U.S. CONST. art. II, § 3 ..... *passim*

U.S. CONST. art. III, § 2 ..... *passim*

Page(s)

STATUTES

15 U.S.C. § 1681(b) 2

15 U.S.C. § 1681n(a) 2

15 U.S.C. § 1681p 2

MISCELLANEOUS

Tara Leigh Grove, *Standing as an Article II Nondelegation Doctrine*, 11 U. PA. J. CONST. L. 781 (2009) 20

James Leonard & Joanne C. Brant, *The Half-Open Door: Article II, the Injury-In-Fact Rule, and the Framers' Plan For Federal Courts of Limited Jurisdiction*, 54 RUTGERS L. REV. 1 (2001) 19

James Madison, THE FEDERALIST NO. 47 9

John Marshall, *Papers of John Marshall* (C. Cullen ed., 1984) 13, 14

Charles de Montesquieu, SPIRIT OF THE LAWS (O. Piest ed., T. Nugent trans. 1949) (1748) 8, 9

John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 DUKE L.J. 1219 (1993) 14

Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881 (1983)..... 12

INTEREST OF *AMICUS CURIAE*[1]

Washington Legal Foundation (WLF) is a public-interest law firm and policy center with supporters in all 50 states. WLF devotes a substantial portion of its resources to defending and promoting free enterprise, individual and business civil liberties, a limited, accountable government, and the rule of law. To that end, WLF regularly appears as *amicus curiae* before this and other federal courts to urge the judiciary to confine itself to deciding only true "Cases or Controversies" under Article III of the Constitution. *See, e.g., Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138 (2013); *Boumediene v. Bush*, 553 U.S. 723 (2008). WLF also frequently participates in litigation to advance its view that separation-of-powers principles embedded in the Constitution bar any one branch of the federal government from exercising powers rightfully reserved to another branch. *See, e.g., Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.* 561 U.S. 477 (2010); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998).

WLF is concerned that the Ninth Circuit's decision, by conferring Article III standing on a plaintiff who suffered no concrete injury, dramatically expands the legislative and judicial

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[1] Pursuant to Supreme Court Rule 37.6, *amicus* WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief. All parties have consented to the filing of this brief; letters of consent have been lodged with the Clerk.

powers—at the expense of the executive power—by transferring to private plaintiffs and the courts the power to enforce federal statutes in contexts far removed from what has traditionally been understood to constitute an adversarial judicial proceeding. WLF fears that the holding below, unless reversed by this Court, will authorize uninjured individuals to invoke federal court jurisdiction based on alleged injuries consisting of little more than an affront to their sensibilities caused by the belief that someone somewhere is not complying with federal law.

STATEMENT OF THE CASE

This case asks the Court to decide whether a person who sues a website operator for allegedly violating the Fair Credit Reporting Act (FCRA)—but who asserts no concrete harm or injury—has satisfied Article III's injury-in-fact requirement. The FCRA requires consumer reporting agencies to "adopt reasonable procedures for meeting the needs of commerce ... in a manner which is fair and equitable to the consumer." 15 U.S.C. § 1681(b). In relevant part, § 1681n states that anyone who "willfully fails to comply" with the FCRA is subject to either actual or statutory damages of between $100 and $1,000. *Id.* § 1681n(a). Further, § 1681p provides that "[a]n action to enforce any liability created under this subchapter may be brought in any appropriate United States district court, without regard to the amount in controversy." *Id.* § 1681p.

Petitioner operates a website that aggregates publicly available information about individuals into a "people search engine" that allows users to easily

locate and view the search results. The collected information ranges from address and phone number to "economic health" and available online purchase history. At all times relevant to this action, the bottom of each search results page expressly stated that "none of the information offered by Spokeo is to be considered for purposes of determining any entity or person's eligibility for credit, insurance, employment, or for any other purpose authorized under the FCRA." Pet. at 4.[2]

Respondent brought a putative class action against Petitioner under the FCRA, alleging that Petitioner qualifies as a "consumer reporting agency" that issues "consumer reports." Pet. App. 19a-20a. Specifically, Respondent alleged that Petitioner's website contained false information about him—namely, that he is wealthier than he is, that he is married (he is not), and that he holds a graduate degree (he does not)—which might "affect his ability to obtain credit, employment, insurance, and the like." Pet. App. 2a. Petitioner moved to dismiss the complaint for lack of subject-matter jurisdiction on the ground that Respondent lacked a requisite injury-in-fact under Article III. *Id.* at 17a. In response, Respondent contended that the FCRA's

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[2] The bottom of each search results page also provided the following disclaimer:

> Spokeo does not verify or evaluate each piece of data, and makes no warranties or guarantees about any of the information offered. Spokeo does not possess or have access to secure or private financial information.

Pet. at 4.

private right of action entitled him to bring suit even in the absence of a concrete injury. *Id.*

Emphasizing that allegations of possible future injury do not satisfy the threshold injury requirement for Article III standing, the district court dismissed the initial complaint without prejudice for failure to allege "any actual or imminent harm." Pet. App. 2a. Following that dismissal, Respondent's amended complaint alleged that, as a result of misinformation provided on Petitioner's website, Respondent suffered actual harm to his "diminished employment prospects." *Id.* In addition, Respondent alleged that his ongoing unemployment gave him "anxiety, stress, concern, and/or worry." *Id.* Petitioner again moved to dismiss for lack of Article III standing.

Although initially concluding that Petitioner's "marketing of inaccurate consumer reporting information" constituted an injury sufficient to confer standing on Respondent, the district court later reconsidered that ruling and dismissed the suit on the basis that a "[m]ere violation of the [FCRA] does not confer Article III standing ... where no injury-in-fact is properly pled." *Id.* at 23a. The district court found that Respondent did not sufficiently plead a concrete injury because "the alleged harm to [Respondent's] employment prospects is speculative, attenuated and implausible." *Id.* at 23a-24a.

On appeal, the Ninth Circuit reversed, holding that because Congress intended to create a statutory right under the FCRA, a bare violation of that right was "sufficient to satisfy the injury-in-fact

requirement of Article III." Pet. App. 8a. Adopting the Sixth Circuit's position in *Beaudry v. TeleCheck Servs., Inc.*, 579 F.3d 702, 705-07 (6th Cir. 2009), the panel held that Respondent was "among the injured" because Petitioner allegedly "violated *his* statutory rights, not just the statutory rights of other people." *Id.* at 8a. Likewise, because the FCRA protects against "individual, rather than collective, harm" the appeals court concluded that Respondent's "personal interests in the handling of his credit information are individualized rather than collective." *Id.* Expressly refusing to premise Respondent's standing on the alleged harm to Respondent's employment prospects or any resulting anxiety, the panel clarified that Respondent satisfied the injury-in-fact threshold of Article III solely on the basis of Petitioner's alleged violation of Respondent's statutory rights. *Id.* at 9a.

SUMMARY OF ARGUMENT

The principle of separation of powers has long been a central feature of our constitutional republic. By denying any one branch of the federal government too much power, the Framers sought to prevent the kind of accumulation of power that inevitably leads to tyranny. Article III, § 2 of the Constitution safeguards the separation of powers among the three branches of the government by extending the "judicial Power" of the United States to only "Cases" and "Controversies." A concrete, particularized injury-in-fact is part of what this Court requires to establish standing to bring a justiciable suit in federal court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

The Ninth Circuit held that an individual satisfies Article III standing whenever he sues for violation of a federal statute that was adopted for his benefit, regardless whether the violation caused him to suffer any actual harm. By authorizing federal courts to enforce federal statutes at the behest of individuals who suffered no concrete injury caused by the alleged statutory violation, the decision below constitutes a significant relaxation of Article III's standing requirements and thus erodes the separation of powers. Simply put, a plaintiff does not establish an injury-in-fact under Article III merely by demonstrating a violation of federal law, even a law adopted for his particular benefit.

The Framers' reliance on Article III standing to limit judicial review reflects their view that "neither department may invade the province of the other and neither may control, direct or restrain the action of the other." *Frothingham v. Mellon*, 262 U.S. 447, 488 (1923). The Ninth Circuit's holding is sharply at odds with this Court's historic understanding of Congress's power to confer Article III standing on individual litigants. Because the injury-in-fact requirement of Article III limits the accumulation of power by the Judicial Branch, this Court has consistently rejected assertions that federal courts may entertain citizen suits to vindicate the public's generalized interest in the proper administration of the laws, even when Congress has explicitly authorized such suits by statute.

Unless the lower courts adhere strictly to Article III's injury-in-fact requirement, the inevitable tendency of such statutes is to transfer to

private plaintiffs and the judiciary responsibility for ensuring that the laws are enforced—a role exclusively reserved to the Executive Branch. The Framers viewed it as the Executive's "most important constitutional duty" to "take Care that the Laws be faithfully executed." *Lujan*, 504 U.S. at 577. Under the Take Care Clause of Article II, § 3, the President has the exclusive duty to ensure that federal law is obeyed. The cornerstone of the Executive's enforcement authority is the exercise of prosecutorial discretion—the power to control the initiation, prosecution, and termination of actions brought to vindicate the federal law. Where, as here, a plaintiff alleges a bare statutory violation without any resulting harm, permitting such suits to proceed in federal court removes from the Executive the prosecutorial discretion that lies at the heart of the President's power to execute the laws.

Under this Court's precedents, congressional delegation of the Executive Branch's prosecutorial discretion to private parties is permissible only when the Executive retains "sufficient control" over that party to ensure that the Executive is able to perform its constitutional duties under the Take Care Clause. *Morrison v. Olson*, 487 U.S. 654, 696 (1988). Because the FCRA does not give the Executive any control over private lawsuits, much less "sufficient control," the Ninth Circuit's holding impermissibly transfers a core Article II function to private plaintiffs. This it cannot do. By authorizing federal courts to enforce compliance of federal law at the behest of uninjured individuals, the decision below does violence to the Constitution's careful separation of powers and should be reversed.

ARGUMENT

I. INJURY-IN-FACT STANDING IS A CRUCIAL ARTICLE III BULWARK PROTECTING THE SEPARATION OF POWERS

A. The Constitution Demands a Clear Separation of Powers Among the Three Branches of Government

It was the French political philosopher Montesquieu who, in his famous *Spirit of the Laws*, provided the classic formulation of the separation of powers:

> When the legislative and executive powers are united in the same person, or in the same body of magistracy, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.
>
> Again, there is no liberty if the power of judging be not separated from the legislative and executive powers, the life and liberty of the subject would be exposed to arbitrary control; for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with all the violence of the oppressor.

Charles de Montesquieu, SPIRIT OF THE LAWS 151-52 (O. Piest ed., T. Nugent trans. 1949) (1748).

Heavily influenced by Montesquieu, the Framers viewed tyranny not merely as the abuse of power, but as the *accumulation* of power. In praising the importance of dividing the concentration of powers within the federal government, James Madison stated, "[n]o political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty." THE FEDERALIST NO. 47 (James Madison). As this Court has recognized, the "principle of separation of powers was not simply an abstract generalization in the minds of the Framers: it was woven into the document that they drafted in Philadelphia in the summer of 1787." *Buckley v. Valeo*, 424 U.S. 1, 124 (1976).

The Constitution thus divides federal power among three co-equal branches, with specific duties to be performed by each. It separates that power into "legislative Powers," Art. I, § 1, "[t]he executive Power," Art. II, § 1, and "[t]he judicial Power," Art. III, § 1. This tripartite distribution of power "is not merely a matter of convenience or of governmental mechanism." *O'Donoghue v. United States*, 289 U.S. 516, 530 (1933). Rather, this Court has long recognized that the "ultimate purpose" of the separation of powers is "to protect the liberty and security of the governed." *Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 272 (1991); *Clinton v. New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring) ("Liberty is always at stake when one or more of the

branches seek to transgress the separation of powers.").

The Constitution's separation of powers was implemented "to assure full, vigorous, and open debate on the great issues affecting the people and to provide avenues for the operation of checks on the exercise of governmental power." *Bowsher v. Synar*, 478 U.S. 714, 722 (1986). "While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

Although "[v]iolations of the separation-of-powers principle have been uncommon because each branch has traditionally respected the prerogatives of the other two," this Court has not hesitated to enforce adherence to that principle when necessary. *See, e.g., Morrison*, 487 U.S. at 693 ("Time and again we have reaffirmed the importance in our constitutional scheme of the separation of governmental powers into the three coordinate branches.").

B. Article III's Injury-in-Fact Requirement for Standing Is Grounded Entirely in Separation-of-Powers Concerns

Article III, § 2 of the Constitution extends the "judicial Power" of the United States to only "Cases" and "Controversies." To be justiciable, every suit brought in federal court must seek to redress an "injury-in-fact" caused by the defendant. *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990). This Court has

explained Article III's standing requirements as follows:

> The irreducible constitutional minimum of standing contains three requirements. ... First, and foremost, there must be alleged (and ultimately proven) an "injury in fact"—a harm suffered by the plaintiff that is "concrete" and "actual and imminent, not 'conjectural' or 'hypothetical.'" ... Second, there must be causation—a fairly traceable connection between the plaintiff's injury and the complained-of conduct of the defendant. ... And third, there must be redressability—a likelihood that the requested relief will redress the alleged injury.

Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 102-103 (1998) (citations omitted). A plaintiff thus lacks standing unless he has suffered "a distinct and palpable injury to himself." *Warth v. Seldin*, 422 U.S. 490, 501 (1975). This bedrock requirement of Article III jurisdiction "cannot be removed." *Summers v. Earth Island Inst.*, 555 U.S. 488, 497 (2009).

Article III's narrow limits on federal jurisdiction are "founded in concern about the proper—and properly limited—role of the courts in a democratic society." *Warth*, 422 U.S. at 498. Accordingly, "federal courts may exercise power only 'in the last resort' ... and only when adjudication is 'consistent with a system of separated powers and [the dispute is one] traditionally thought to be

capable of resolution through the judicial process.'" *Allen v. Wright*, 468 U.S. 737, 752 (1984) (citations omitted).

In particular, Article III's concrete injury-in-fact requirement is "a crucial and inseparable element" of separation-of-powers principles embedded in the Constitution, "which successively describes where the legislative, executive, and judicial powers, respectively, shall reside." Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 881-82 (1983). It is the injury-in-fact requirement that "makes possible the gradual clarification of the law through judicial application." *Allen*, 468 U.S. at 752. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006) ("This Court has recognized that the case-or-controversy limitation is crucial in maintaining the tripartite allocation of power set forth in the Constitution.") (internal quotations omitted).

Failure to enforce Article III's core standing requirements invariably leads to "an over-judicialization of the processes of self-governance." Scalia, *supra*, at 881. Unfortunately, as elaborated below, the Ninth Circuit's decision in this case, left unchecked, will severely erode the Constitution's carefully balanced separation of powers..

II. PERMITTING FEDERAL COURTS TO ADJUDICATE SUITS BROUGHT BY PLAINTIFFS WHO LACK A CONCRETE INJURY VIOLATES THE SEPARATION OF POWERS

The separation of powers is violated any time one branch of government (1) aggrandizes itself at the expense of another or (2) undermines the constitutionally granted powers of another, even without aggrandizement of its own power. *See, e.g.*, *Clinton v. Jones*, 520 U.S. 681, 701 (1997). Allowing uninjured persons who lack Article III standing to bring suit in federal court, as authorized by the Ninth Circuit's decision, infringes the separation of powers by enlarging judicial and legislative power at the expense of the Executive. At the same time, authorizing federal courts to enforce federal statutes at the behest of private individuals who have suffered no concrete injury permits Congress to interfere unduly with the Executive Branch's constitutional duty to enforce the nation's laws under the Take Care Clause in Article II.

A. The decision below contravenes Article III's requirement that the judicial power extends to only true "Cases" or "Controversies"

A federal court's exercise of jurisdiction over litigants absent a legitimate "case" or "controversy" under Article III (*i.e.*, absent a cognizable injury-in-fact) flies in the face of fundamental separation-of-powers principles. "[I]f the judicial power extended ... to every question under the laws ... of the United States," Chief Justice John Marshall warned, "[t]he

division of power [among the three branches of government] could exist no longer, and the other departments would be swallowed up by the judiciary." 4 *Papers of John Marshall* 95 (C. Cullen ed., 1984).

Ultimately, the Court's arrogation of power comes at the expense of the people and their elected representatives. By preventing an unelected, life-tenured judiciary from exercising executive or legislative powers—which are the exclusive province of the politically accountable branches of government—Article III's injury-in-fact requirement cabins the federal judiciary to its historic adjudicatory role:

> In limiting the judicial power to "Cases" and "Controversies," Article III of the Constitution restricts it to the traditional role of Anglo-American courts, which is to redress or prevent actual or imminently threatened injury to persons caused by private or official violation of the law. Except when necessary in the execution of that function, courts have no charter to review and revise legislative and executive action.

Summers, 555 U.S. at 492-93. The injury-in-fact requirement thus "ensures that the courts will more properly remain concerned with tasks that are, in Madison's words, 'of a Judiciary nature.'" John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 DUKE L.J. 1219, 1232 (1993) (citation omitted).

Moreover, the requirement that every case before the court be anchored in some concrete injury ensures that the legal questions presented will be resolved "not in the rarified atmosphere of a debating society" but rather with "a realistic appreciation of the consequences of judicial action." *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State*, 454 U.S. 464, 472 (1982). As the Court explained more than 40 years ago:

> To permit a complainant who has no concrete injury to require a court to rule on important constitutional issues would create the potential for abuse of the judicial process, distort the role of the Judiciary in its relationship to the Executive and the Legislature, and open the Judiciary to an arguable charge of providing "government by injunction."

Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 222 (1974) (citation omitted).

Contrary to the view of the Ninth Circuit, an injury-in-law is *not* an injury-in-fact. The panel below attempted to vitiate this crucial distinction by suggesting that "alleged violations of [a plaintiff's] statutory rights are sufficient to satisfy the injury-in-fact requirement of Article III." Pet. App. 8a. But this Court has already considered and squarely rejected that suggestion:

> [T]here is absolutely no basis for making the Article III inquiry turn on

> the source of the asserted right. Whether the courts were to act on their own, or at the invitation of Congress, in ignoring the concrete injury requirement ..., they would be discarding a principle so fundamental to the separate and distinct constitutional role of the Third Branch—one of the essential elements that identifies those "Cases" and "Controversies" that are the business of the courts rather than of the political branches.

Lujan, 504 U.S. at 576. Indeed, "[i]t is settled that Congress cannot erase Article III standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing." *Raines v. Byrd*, 521 U.S. 811, 820 n.3 (1997); *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979) ("[I]n no event ... may Congress abrogate the Art. III minima: A plaintiff must always have suffered a 'distinct and palpable injury to himself.'") (quoting *Warth*, 422 U.S. at 501).

Nor is this a situation in which Congress has statutorily broadened the categories of injury through legislation and then allowed individuals to sue to recover for that injury. *See Lujan*, 504 U.S. at 578; *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982). In such cases, litigation is authorized only to enforce preexisting substantive rights and to redress the plaintiff's injury-in-fact. But as this Court has cautioned, "broadening the categories of injury that may be alleged in support of standing is a different matter from abandoning the requirement that the

party seeking review must himself have suffered an injury." *Sierra Club v. Morton*, 405 U.S. 727, 738 (1972). In the absence of any concrete injury-in-fact on the part of the plaintiff, the Ninth Circuit's holding below violates Article III and must be reversed.

B. The decision below contravenes Article II's requirement that the President "take Care" that the laws are faithfully executed

Granting standing to an individual who has suffered no concrete injury also invades the exclusive province of the Executive Branch to enforce federal law under the Take Care Clause in Article II, § 3 ("[The President] shall take Care that the Laws be faithfully executed."). "As Madison stated on the floor of the first Congress, 'if any power whatsoever is in its nature Executive, it is the power of appointing, overseeing, and *controlling* those who execute the laws.'" *Free Enter. Fund*, 561 U.S. at 492 (quoting 1 Annals of Cong. 463 (1789)) (emphasis added).

As this Court has recognized, "[t]he Constitution does not leave to speculation who is to administer the laws enacted by Congress; the President, it says, 'shall take Care that the Laws be faithfully executed,' Art. II, § 3, personally and through officers whom he appoints." *Printz v. United States*, 521 U.S. 898, 922 (1997). The Take Care Clause thus imposes on the Executive Branch a duty to undertake all necessary means, including bringing suit in federal court, to ensure that federal law is obeyed. *Allen*, 468 U.S. at 761 ("The Constitution,

after all, assigns to the Executive Branch, and not to the Judicial Branch, the duty to 'take Care that the Laws be faithfully executed.'").

Lacking any concrete injury-in-fact, the plaintiff in this case seeks, in essence, to vindicate the general public interest triggered by a bare violation of federal law. But "[v]indicating the public interest ... is the function of Congress and the Chief Executive." *Lujan*, 504 U.S. at 576. Indeed, the separation of powers precludes Congress from converting the general public interest in enforcement of the law, which is the exclusive province of the Executive Branch, into a private right of action for an uninjured plaintiff. "A lawsuit is the ultimate remedy for a breach of the law, *and it is to the President, and not to the Congress*, that the Constitution entrusts responsibility to 'take Care that the Laws be faithfully executed.'" *Buckley*, 424 U.S. at 138 (emphasis added).

By broadly construing the FCRA's standing provision to permit suits by uninjured persons, the Ninth Circuit's holding effectively transfers the Executive Branch's enforcement duty under the Take Care Clause to politically unaccountable private parties. This it may not do. Such a construction "violates the basic principle that the President 'cannot delegate ultimate responsibility or the active obligation to supervise that goes with it,' because Article II 'makes a single President responsible for the actions of the Executive Branch.'" *Free Enter. Fund*, 561 U.S. at 496 (quoting *Clinton*, 520 U.S. at 712-13) (Breyer, J., concurring).

Consistent with Article II, a plaintiff lacks standing to seek the mere "vindication of the rule of law." *Steel Co.*, 523 U.S. at 106. Indeed, this Court's precedents weigh "against recognizing standing in a case brought, not to enforce specific legal obligations whose violation works a direct harm, but to seek a restructuring of the apparatus established by the Executive Branch to fulfill its legal duties." *Allen*, 468 U.S. at 761. A contrary view, which would allow any private individual to sue whenever the law is violated, diminishes the political accountability of the Executive for enforcement of the laws:

> Enforcement of the law is a political decision left to the Executive Branch; it becomes the concern of the courts only when individually aggrieved plaintiffs appear before them. Permitting Congress to confer standing on anyone by denominating rights as individualized entitlements would disrupt the balance that the Framers created to protect the executive from legislative power.

James Leonard & Joanne C. Brant, *The Half-Open Door: Article II, the Injury-In-Fact Rule, and the Framers' Plan For Federal Courts of Limited Jurisdiction*, 54 RUTGERS L. REV. 1, 115 (2001).

The Executive's ability to control the initiation, prosecution, and termination of actions brought to vindicate the Executive's obligation to ensure that federal law is obeyed is crucial to carrying out its enforcement duties. The keystone of this enforcement authority is the exercise of

prosecutorial discretion—the power to decide when, how, and against whom the laws should be enforced. Such discretion "creates a troubling potential for abuse, even when it is exercised by a governmental entity that is subject to constitutional and other legal and political constraints." Tara Leigh Grove, *Standing as an Article II Nondelegation Doctrine*, 11 U. PA. J. CONST. L. 781, 790 (Apr. 2009). That is why "the Constitution prohibits Congress and the Executive Branch from delegating such prosecutorial discretion to private parties, who are subject to no such requirements." *Id.*

In *Morrison v. Olson*, 487 U.S. 654 (1988), this Court clarified that, to avoid violating the Take Care Clause, a statute divesting the Executive Branch of some measure of prosecutorial discretion must "give the Executive Branch sufficient control ... to ensure that the President is able to perform his constitutionally assigned duties." 487 U.S. at 696. *Morrison* involved a constitutional challenge to the Ethics in Government Act of 1978, which authorized the appointment of an independent counsel to investigate and prosecute high-ranking government officials. *Id.* at 660-61. In sustaining the law, the Court emphasized that the challenged statute included "several means of supervising or controlling the prosecutorial powers that may be wielded by an independent counsel," which satisfied the Executive's obligation under the Take Care Clause to maintain sufficient control over any prosecution. *Id.* at 696.[3]

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[3] For Justice Scalia, even the statutory controls retained by the Executive Branch in *Morrison* could not excuse the independent counsel's "utter incompatibility" with the

Specifically, the statute at issue in *Morrison* ensured that the Executive Branch, acting through the Attorney General, (1) "retained the power to remove the counsel for 'good cause,'" (2) retained the discretion "not to request appointment if [the Attorney General] finds 'no reasonable grounds to believe that further investigation is warranted,'" (3) controlled the scope of the litigation because "the jurisdiction of the independent counsel is defined with reference to the facts submitted by the Attorney General," and (4) could ensure that the prosecution was pursued in the public interest by requiring the independent counsel to "abide by Justice Department policy" whenever possible. *Id.*

None of the statutory safeguards identified in *Morrison* is present in the FCRA. The plaintiff in this case is subject to no control or oversight whatsoever by the Executive Branch or the Attorney General. In fact, the FCRA omits any mention of Executive involvement, nor does the statute require that the Attorney General receive notice of FCRA litigation. Further, in stark contrast to the independent counsel at issue in *Morrison*, uninjured private plaintiffs are motivated by financial gain wholly unrelated to the "public good." In the absence of "sufficient control" by the Executive, the Ninth Circuit's understanding of the reach of FCRA standing violates Article II and must be reversed.

Constitution's separation of powers. *See* 487 U.S. at 708 (Scalia, J., dissenting) (stating that "it is ultimately irrelevant *how much* the statute reduces Presidential control" because "*all* purely executive power" must remain with the President).

C. The Executive Branch may not acquiesce to encroachments on its constitutionally assigned powers

In its brief in opposition to discretionary review in this case, the United States contends that "[t]he court below correctly concluded that the publication of such false information is a cognizable Article III injury." Br. of the United States as *Amicus Curiae* (March 15, 2015). Not only is the Solicitor General's view on this question undeserving of deference, it is wholly irrelevant. It is well settled that one branch of government cannot consent to another branch's encroachment on its constitutional role. Indeed, the Constitution's division of powers among the three branches of government is violated any time one branch invades the territory of another, "whether or not the encroached-upon branch approves the encroachment." *New York v. United States*, 505 U.S. 144, 182 (1992) ("The Constitutional authority of Congress cannot be expanded by the 'consent' of the governmental unit whose domain is thereby narrowed.").

For example, in *Buckley v. Valeo*, the Court held that Congress had infringed upon the President's appointment power even though the President had consented to the statute that caused the infringement by signing it into law. 424 U.S. at 118-37. Likewise, in *INS v. Chadha*, the Court held that the legislative veto violated the Constitution's requirement that legislation be "presented to" the President, despite the fact that Presidents had for decades approved hundreds of statutes containing legislative veto provisions. 462 U.S. 919, 944-45 (1983).

CONCLUSION

For the foregoing reasons, *amicus curiae* Washington Legal Foundation respectfully requests that the Court reverse the judgment of the Ninth Circuit.

Respectfully submitted,

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